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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 79

STELLA CONNELL, Individually, and on behalf of all persons similarly situated,

Appellant,

—v.—

JAMES M. HIGGINBOTHAM, Superintendent of the Orange County Board of Public Instruction, LOUISE BREEZE, Chairman of the Orange County Board of Public Instruction, and LOWELL CLEMENTS, RAYMOND H. BASSETT, WILLIAM D. LARUE, HARLEY THOMPKINS, MRS. LEE K. DAVIES and STEWART M. SCHAFFER,

Appellees,
(Defendants)

FLOYD T. CHRISTIAN, Commissioner of Education, State of Florida,

Appellee.
(Intervenor)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Constitutional Provisions, Statutes and Oaths Involved	3
Questions Presented	3
Statement of the Case	4
Summary of Argument	11
ARGUMENT	
POINT I	
On their face and as applied, the portions of the Florida loyalty statute and oath declared not unconstitutional by the Court below, violate the First and Fourteenth Amendments' protection of the freedom of expression, belief, and privacy	13
A. The Negative Loyalty Oath Validated by the Court Below Unconstitutionally Invades First Amendment Freedom and Is Overbroad	14
B. The Affirmative Loyalty Oath Validated by the Court Below Unconstitutionally Invades First Amendment Freedoms and Is Overbroad	23

PAGE

C. Indiscriminately Required Loyalty Oaths Unconstitutionally Abridge the Freedoms of Expression, Belief and Privacy 28

POINT II

On their face and as applied, Florida's two statutory and oath provisions, which were left standing by the Court below, violate the Due Process clause of the Fourteenth Amendment in that they are unduly vague and provide no opportunity for clarification hearing or procedure 38

POINT III

The Court below erred in ruling that some portions of the Florida statute and oath were severable from the unconstitutional portions 45

CONCLUSION 50

APPENDICES:

United States Constitutional Provisions Involved 1a

Statutes 2a

Loyalty Oaths 5a

Memorandum Opinion 7a

Judgment 12a

Temporary Restraining Order 14a

Administrative Memoranda 20a

Stipulation 25a

Table of Authorities

PAGE

Cases:

A Quantity of Books v. Kansas, 378 U.S. 205 44
Albertson v. Subversive Activities Control Board, 382 U.S. 70 30
American Communications Ass'n v. Douds, 339 U.S. 382 ..... 14, 16, 35, 36, 38
Aptheker v. Secretary of State, 378 U.S. 500 43

Baggett v. Bullitt, 377 U.S. 360 ..... 3, 12, 14, 18, 27, 28, 34, 39, 40, 42, 43
Bantam Books v. Sullivan, 372 U.S. 58 44
Barenblatt v. United States, 360 U.S. 109 18
Bates v. City of Little Rock, 361 U.S. 516 31
Bond v. Floyd, 385 U.S. 116 ..... 23, 29, 37
Brandenburg v. Ohio, 395 U.S. 444 ..... 15, 16, 19, 41

Cantwell v. Connecticut, 310 U.S. 296 11
Cole v. Young, 351 U.S. 536 33
Connally v. General Construction Co., 269 U.S. 385 ..... 12, 38
Cramp v. Board of Public Instruction of Orange County, 137 So.2d 828 (Fla. 1962) 20, 24, 27, 28, 46, 48, 49, 50
Cramp v. Board of Public Instruction of Orange County, 368 U.S. 278 ..... 5-6, 11, 14, 28, 39, 41

DeGregory v. Attorney General, 383 U.S. 825 31
DeJonge v. Oregon, 299 U.S. 353 33
Dorchy v. Kansas, 264 U.S. 286 45

Elfbrandt v. Russell, 384 U.S. 11 ..... 12, 14, 19, 24, 27, 28, 30, 34, 42
Ex parte Garland, 71 U.S. (4 Wall.) 333 ..... 12, 25, 26

PAGE

Flast v. Cohen, 392 U.S. 83 3
Florida Lime and Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73 3
Freedman v. Maryland, 380 U.S. 51 44

Gallagher v. Smiley, 270 F. Supp. 86 (D. Colo. 1967) ..34, 40
Garrity v. New Jersey, 385 U.S. 493 30
Georgia Conf. of AAUP v. Board of Regents, 246 F. Supp. 553 (N.D. Ga. 1965) 27
Gibson v. Florida Legislative Investigative Committee, 372 U.S. 539 ..... 12, 31
Girouard v. United States, 328 U.S. 61 17
Gojack v. United States, 384 U.S. 702 31
Griswold v. Connecticut, 381 U.S. 479 ..... 11, 17

Haskett v. Washington, 294 F. Supp. 912 (D. D.C. 1968) 29, 43, 45
Heckler v. Shepard, 243 F. Supp. 841 (D. Idaho 1965) 44
Hosack v. Smiley, 276 F. Supp. 876 (D. Colo. 1967), *aff'd mem.*, 390 U.S. 744 ..... 23, 33

Interstate Circuit v. City of Dallas, 390 U.S. 676 43

James v. Gilmore, 389 U.S. 572, *aff'g per curiam*, 274 F. Supp. 75 (N.D. Tex. 1967) 14, 28

Keyishian v. Board of Regents of New York, 385 U.S. 589 ..... 11, 12, 14, 18, 19, 21, 25, 27, 28, 31, 32, 40, 42, 43
Kingsley Int'l Picture Corp. v. Regents, 360 U.S. 684 15
Knight v. Board of Regents, 269 F. Supp. 339 (S.D. N.Y. 1967), *aff'd mem.*, 390 U.S. 36 ..... 23, 33
Konigsberg v. State Bar of California, 353 U.S. 252 44

PAGE

Lamont v. Postmaster General, 381 U.S. 301 ..... 30, 44
Lanzetta v. New Jersey, 306 U.S. 451 39
Law Students Civil Rights Research Council, Inc. v. Wadmond, 299 F. Supp. 117 (S.D.N.Y. 1969), *probable juris. noted*, 396 U.S. 999 29

Marchetti v. United States, 390 U.S. 39 28
Marcus v. Search Warrant, 367 U.S. 717 44
Morey v. Doud, 354 U.S. 457 45

Noto v. United States, 367 U.S. 290 41

Ohlson v. Phillips, 304 F. Supp. 1152 (D. Colo. 1969), *aff'd mem.*, 397 U.S. 317 ..... 23, 24, 33
Olmstead v. United States, 277 U.S. 438 17
Osman v. Douds, 339 U.S. 846 14

Palmetto Fire Ins. Co. v. Conn, 272 U.S. 295 3
Pedlosky v. Massachusetts Institute of Technology, 352 Mass. 127, 224 N.E.2d 414 (1967) 34, 47

Reitz v. Mealey, 314 U.S. 33 45
Richardson v. Cole, 300 F. Supp. 1321 (D. Mass. 1969), *vacated and remanded*, 397 U.S. 238 ..... 23, 25, 27, 34, 41, 47

Scales v. United States, 367 U.S. 203 20
Schneider v. Smith, 390 U.S. 17 ..... 17, 19, 30, 31
Schneiderman v. United States, 320 U.S. 118 17
School District of Abington Township v. Schempp, 374 U.S. 203 37
Schware v. Board of Bar Examiners, 353 U.S. 232 44
Shelton v. Tucker, 364 U.S. 479 ..... 3, 11, 19, 31

PAGE

Shuttleworth v. City of Birmingham, 394 U.S. 147 43
Slochower v. Board of Higher Education, 350 U.S. 551 44
Small v. Sun Oil Co., 222 So.2d 196 (Fla. 1969) 46
Smith v. California, 361 U.S. 147 39
Speiser v. Randall, 357 U.S. 513 .... 11, 12, 16, 30, 39, 42, 44, 45
Spevack v. Klein, 385 U.S. 511 30
Stanley v. Georgia, 394 U.S. 557 17
State v. Diez, 97 So.2d 105 (Fla. 1957) 27
Stewart v. Washington, 301 F. Supp. 610 (D. D.C. 1969) 28, 29, 30
Street v. New York, 394 U.S. 576 15
Sweezy v. New Hampshire, 354 U.S. 234 .... 16, 18

Thalberg v. Board of Trustees of the Univ. of Illinois, 309 F. Supp. 630 (N.D. Ill. 1969) 29
Thomas v. Collins, 323 U.S. 516 16
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 18
Torcaso v. Watkins, 367 U.S. 488 .... 17, 43

United States v. Brown, 381 U.S. 437 14
United States v. Jackson, 390 U.S. 570 46
United States v. O'Brien, 391 U.S. 367 19
United States v. Robel, 389 U.S. 258 .... 11, 15, 19, 23, 27-28, 31, 43
United States v. Rumely, 345 U.S. 41 17

Vogel v. County of Los Angeles, 68 Cal.2d 18, 434 P.2d 961, 64 Cal. Rptr. 409 (1967) 29

PAGE

Watkins v. United States, 354 U.S. 178 17
Watts v. United States, 394 U.S. 705 15
Welsh v. United States, 90 S. Ct. 1792 ..... 11, 16
West Virginia State Board of Education v. Barnette, 319 U.S. 624 ..... 11, 17, 18, 37, 38, 43
Whitehill v. Elkins, 389 U.S. 54 (D. Md. 1968) *on remand*, 287 F. Supp. 61 (D. Md. 1968) 11, 14, 18, 21, 25, 28, 29, 39, 42, 47
Wieman v. Updegraff, 344 U.S. 183 18
Williams v. Standard Oil of Louisiana, 278 U.S. 235 45
Winters v. New York, 333 U.S. 507 39
Wisconsin Builders Supply Co., In re, 239 F.2d 649 (7th Cir. 1956), *cert. denied*, 353 U.S. 985 45

Yates v. United States, 354 U.S. 298 ..... 20, 41

Constitutional Provisions:

United States Constitution

Article II, §1 ..... 23, 29
Article VI 23, 29
First Amendment ..... *passim*
Fifth Amendment 2, 3, 30, 33, 44
Fourteenth Amendment 2, 3, 4, 8, 11, 13, 14, 29, 38, 50

Federal Statutes:

28 U.S.C. §1253 3
28 U.S.C. §1331 2
28 U.S.C. §1343 2
28 U.S.C. §2201 2
28 U.S.C. §2202 2
28 U.S.C. §2281 2
28 U.S.C. §2284 2

PAGE

State Statutes:

Colorado Revised Statutes, 1963

Ch. 123, art. 17, §§6-8 40

Florida Statutes Annotated

Section 233.064 ..... 21, 23
Section 233.064(7) 23
Sections 876.05-876.10 ..... 2, 3, 6, 9, 10, 27, 42, 47, 48

Rule:

Federal Rules of Civil Procedure

Rule 23 ..... 2, 7

Other Authorities:

Asper, *The Long and Unhappy History of Loyalty Testing in Maryland*, 13 AM. J. LEG. HIST. 97 (1969) 29, 34, 35, 36, 37

Bently Glass on Test Oaths, 46 AAUP Bull. 290 (Autumn 1960) 30, 37

Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963) 15, 20, 35, 37

Gonzalez, *State Laws of 1969 Dealing with Student Unrest* (Nov. 5, 1969, Mimeo. Nat'l Ass'n of State Universities and Land-Grant Colleges) 22

Heller, CATCH-22 (1961) 110 38

HYMAN, TO TRY MEN'S SOULS (1960) 29

Meiklejohn, *The First Amendment Is an Absolute*, 1961 S.Ct.Rev. 245 15

PAGE

O'Neil, The Price of Dependency 87 (1970) 35
Skolnick, *The Politics of Protest* 15 (Ballantine ed. 1969) 20, 40
Stern, *Separability and Separability Clauses in the Supreme Court*, 51 Harv. L. Rev. 76 (1937) 48
2 Sutherland, *Statutory Construction*, Sections 2418, 2407, 2404 (3rd Ed., 1943) 48
Tolkien, Lord of the Rings, Vol. I, p. 294 (2nd ed. 1967) 27

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FLOYD T. CHRISTIAN, Commissioner of Education, State of Florida,

Appellee.
(Intervenor)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF OF APPELLANT

Opinions Below

The Order of March 18, 1969, of the United States District Court for the Middle District of Florida, Honorable George C. Young presiding, denying a temporary restraining order is not reported; it is printed in the Appendix

at p. 13.[1] The decision from the bench by the Honorable George C. Young denying the temporary restraining order is not reported, and is printed in the Appendix at p. 34. The decision of the statutory three judge United States District Court for the Middle District of Florida and the concurring and dissenting opinions are reported at 305 F. Supp. 445. The opinions and the judgment are also set out in the Appendix at p. 141. The opinions and the orders in the related case of *Adams* v. *Board of Regents*, No. 105 in the October Term, 1970 which was docketed on March 5, 1970 are not reported, they are printed in the appendix contained in this brief, *infra*, at pp. 7a-19a.

Jurisdiction

This class suit was brought under 28 U.S.C. §§1331, 1343, 2201, 2202, 2281 and 2284, Rule 23 of the Federal Rules of Civil Procedure, and the First, Fifth and Fourteenth Amendments to the Constitution of the United States to declare unconstitutional and enjoin enforcement of the provisions of Florida Statutes Annotated §§876.05-876.10 and of the loyalty oaths required pursuant to them as a condition of public employment. The order of the three-judge District Court denying some of the appellant's prayers for relief was dated October 30, 1969, and notice of appeal was filed in the District Court for the Middle District of Florida on November 25, 1969. The Jurisdictional Statement was filed on January 23, 1970; probable jurisdiction was noted by this Court on June 8, 1970. The juris-

[1] The Appendix references will be noted as Jt. App. The references to the appendix contained in this brief will be noted App., *infra*.

diction of the Supreme Court to review this decision and order by direct appeal is conferred by 28 U.S.C. §1253. The following decisions, among many, sustain the jurisdiction of the Supreme Court to review the judgment and order on direct appeal in this case: *Palmetto Fire Ins. Co.* v. *Conn*, 272 U.S. 295, 305; *Florida Lime and Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73, 85; *Shelton* v. *Tucker*, 364 U.S. 479; *Baggett* v. *Bullitt*, 377 U.S. 360; *Flast* v. *Cohen*, 392 U.S. 83.

Constitutional Provisions, Statutes and Oaths Involved

Involved here are the First, Fifth and Fourteenth Amendments to the United States Constitution, §§876.05-876.10 of Fla. Stats. Ann., and the various loyalty oaths upon which appellant's employment as a school teacher was conditioned. The statutory provisions and oaths to which she was subjected are set forth in the Appendix, *infra*, pp. 2a-6a.

Questions Presented

1. Do the portions of the Florida loyalty statute and oath that were validated by the Court below violate, on their face and as applied, the freedoms of expression, belief, and privacy guaranteed by the First, Fifth and Fourteenth Amendments?

2. Are the portions of the Florida loyalty statute and oath that were validated by the Court below, on their face and as applied, unduly broad in violation of the First, Fifth and Fourteenth Amendments?

3. Do test oaths, whether negative or affirmative in formulation, necessarily violate constitutional freedoms of expression, belief, and privacy?

4. Do the portions of the Florida loyalty statute and oath that were validated by the Court below violate, on their face and as applied, the due process clause of the Fourteenth Amendment in that they are unduly vague and provide no opportunity or procedure for clarification?

5. Did the Court below err in ruling that some portions of the Florida loyalty statute and oath were severable from the unconstitutional provisions?

Statement of the Case[1a]

The appellant is a citizen of the United States and resides in Orange County, Florida. The appellees are the Superintendent of Public Instruction of Orange County, Florida and the Chairman and members of the Board of Public Instruction of Orange County, Florida. After the Complaint was filed, the Commissioner of Education of the State of Florida was granted leave to intervene as a party defendant and presently is an appellee before this Court.

On or about January 16, 1969, appellant made application for a teaching position with the Orange County school system (Jt. App. p. 142). She was interviewed by the principal of Callahan Elementary School, Orlando, Orange County (Jt. App. p. 142). On or about January 27, 1969 she was employed as a classroom teacher in the Fourth Grade of that school by the appellees and their agents (Jt. App. pp. 142-43).

[1a] This statement of the case is taken from the opinion on the merits by the court below, except where facts are not noted in that opinion.

At no time prior to her employment was the appellant informed by the appellees that execution of a loyalty oath was a condition of her employment and payment by the appellees (Jt. App. p. 143). The District Court did find, however, that she had some knowledge of the applicable statute at the time she commenced the employment (Jt. App. p. 143). On February 7, 1969, the appellees notified appellant that she would be required to execute a loyalty oath as a condition of continuing her employment (Jt. App. p. 143). Specifically she was asked to declare:

> "I, ..., a citizen of the State of Florida and of the United States of America, and being employed by or an officer of ..... and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence" (Jt. App. pp. 10-11).

The District Court found that the oath was identical to the one declared unconstitutional by this Court nine years ago in a case involving the precise statute at issue in the instant case and many of the same parties-defendant in their official capacities. *Cramp* v. *Board of Public In-*

struction of Orange County, 368 U.S. 278 (Jt. App. p. 143). The appellant declined to execute the oath on the ground that it was invalid and unconstitutional and had been declared so by this Court (Jt. App. pp. 143, 134-40). The appellees then asked appellant to sign a version of the oath as judicially amended by the Supreme Court of Florida on remand from this Court (Jt. App. p. 143). *Cramp* v. *Board of Public Instruction of Orange County,* 137 So.2d 828 (Fla. 1962).[2] The appellant refused to sign the modified oath and the District Court found that processing of her employment papers was halted before final consideration by the Board of Public Instruction (Jt. App. p. 143).

The appellees informed the appellant that they were barred by Section 876.08 of Fla. Stats. Ann. from paying her for past or future services until the oath was executed (Jt. App. p. 143). After they were informed by the appellant that she anticipated filing suit in the United States District Court, the appellees permitted the appellant to remain in her teaching post without pay, pending judicial decision on the matter (Jt. App. p. 143).

On February 26, 1969, the appellant filed her complaint against the appellees. After an evidentiary hearing (see Jt. App. pp. 22-34, 36-70), the District Court denied her motion for a temporary restraining order and she was dis-

[2] On remand, the Supreme Court of Florida ruled that only the phrase "that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party" was constitutionally infirm under this Court's decision. The phrase was declared severable both from the statute and from the oath. Thus the second oath required of appellant was identical to the first one, but for the absence of the void phrase. Notably, the first oath was on a mimeographed "official" form; the second was typed from that master, eliminating the guilty phrase. (A facsimile of the first oath is found at Jt. App. p. 168; App., *infra,* p. 5a. A facsimile of the second oath is found at Jt. App. p. 169; App., *infra,* p. 6a.)

missed by the defendants from her teaching position on March 18, 1969 (Jt. App. pp. 13, 34).

On October 30, 1969, again after an evidentiary hearing (see Jt. App. pp. 71-140), the District Court entered its Judgment, in favor of the appellant individually and on behalf of all persons similarly situated. It ruled, *inter alia*, that: (1) Under Rule 23 of the Federal Rules of Civil Procedure, appellant had standing to maintain a class action "on behalf of all state employees who are required to execute a loyalty oath as a condition of their employment with the state" (Jt. App. p. 145) (305 F. Supp. at 449-50). (2) The phrase in the statute and first loyalty oath, "I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party," had been declared unconstitutional by this Court in 1961 (Jt. App. p. 148) (305 F. Supp. at 450-51). (3) The phrases in the statute and the loyalty oaths, "that I am not a member of the Communist Party" and "that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence," unduly infringed "upon the right of free association granted by the First and Fourteenth Amendments . . ." (Jt. App. p. 148) (305 F. Supp. at 451-52). (4) The phrases in the statute and the loyalty oaths, "that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence" and "I will support the Constitution of the United States and of the State of Florida," are not themselves unconstitutional (Jt. App. pp. 151-52) (305 F. Supp. at 452-53). (5) Under Florida and federal law, the unconstitutional portions of the statute and oath are severable (Jt. App. pp. 147-48) (305 F. Supp. at 450); consequently, the State of Florida still may require a loyalty

oath as a condition of public employment (Jt. App. p. 153) (305 F. Supp. at 453). (6) Since the appellant was discharged solely because she declined to execute an oath containing unconstitutional language, she was entitled to her salary as a substitute teacher for the seven weeks of actual time she spent teaching and for the salary she would have received from March 18, 1969, to the end of the school term in June 1969 (Jt. App. p. 154) (305 F. Supp. at 454).

The defective portions of the statute and oath were declared unconstitutional (Jt. App. p. 153) (305 F. Supp. at 453-54). The appellees were permanently enjoined from conditioning employment on the taking of an oath including the language declared unconstitutional and "from enforcing §876.07 of Florida Statutes in such a manner as to require the execution of the above disapproved phrases as a condition to remaining in the defendants' employ or as a condition to receiving payment from the defendants for services rendered" (Jt. App. p. 157) (305 F. Supp. at 455). Finally, jurisdiction was retained over the suit "for the purpose of insuring compliance with the injunction and the order directed to the defendants to pay the plaintiff the salary that has been adjudged to be due and owing" (Jt. App. p. 157) (305 F. Supp. 455). Circuit Judge Simpson, who concurred in part and dissented in part, would have declared the two remaining phrases in the statute and oaths unconstitutional, under the First and Fourteenth Amendments (Jt. App. p. 155) (305 F. Supp. at 454-55).

On November 25, 1969, Notice of Appeal was filed by the Appellant, appealing from the portions of the District Court's decision and Order sustaining the constitutionality of the two remaining phrases in the statute and loyalty oath, declining to enjoin the appellees from enforcing these and any other applicable portions of the statute, and

declining to declare §§876.05-876.10 unconstitutional in their entirety (Jt. App. pp. 158-59). The appellees have not filed a cross appeal.

Subsequent to the decision and Order of the District Court, employees of the University of Florida were required to execute loyalty oaths in the form presumptively sustained by the District Court in the instant case.

The incident gave rise to a new class action in the United States District Court for the Middle District of Florida. *Adams* v. *Board of Regents of the State of Florida,* Civ. Action No. 69-240, M.D. Fla. Jan. 27, 1970, *juris. statement* filed No. 105 in the October Term, 1970. An affidavit executed by one of the plaintiffs in that suit is a part of the record in the instant case (Jt. App. pp. 140-41).

For the convenience of the Court and because of the close relationship between the two cases, copies of the significant documents in *Adams* are included in the appendix contained in this Brief, *infra,* at pp. 7a-27a, and the facts of that case are recited in full in the footnote which follows immediately.[3]

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[3] The plaintiffs in *Adams* are or were faculty and staff members of the University of Florida and other state institutions under the control of the Board of Regents. The defendants are the Board of Regents of The State of Florida, its individual members, and the President of the University of Florida.

Included among the plaintiffs were eight professors, a teaching assistant and two clerical employees (*Adams* Complaint, p. 2). As a direct consequence of refusing to sign the loyalty oath, three members of appellants' class, a professor of law, an instructor of psychology and a library clerk, have been discharged from their employment (App. *infra,* pp. 9a, 25a-26a).

On October 16, 1969 defendant O'Connell issued a memorandum to all faculty and staff of the University informing them that they would be required to execute the loyalty oath prescribed by

section 876.03 of the Florida Statutes prior to November 15, 1969 (App. *infra*, pp. 8a, 20a-21a).

The form of the oath was identical in all essentials to the oath required of the Appellant Connell in the instant case. (See Exhibit D to *Adams* Complaint). On October 17 a subsequent staff memorandum advised all employees that "any employee refusing to comply with the provisions of this section of the Florida Statutes shall be dismissed" (App. *infra*, p. 22a).

Faced with the Hobson's choice of either subscribing to what they felt was an unconstitutional oath or being summarily dismissed, plaintiffs filed suit on October 24, 1969 requesting the convening of a three-judge court and seeking declaratory and injunctive relief.

The application for a temporary restraining order was heard by District Judge Young on October 30, 1969. Immediately prior to that hearing, the final judgment of a three-judge court was filed in *Connell* v. *Higginbotham*.

As a consequence of the *Connell* decision, Judge Young entered an order in the *Adams* case on November 7, 1969 denying plaintiffs' application for a temporary restraining order, except that the oath submitted to them could not contain the language invalidated by the three-judge court in *Connell* (App. *infra*, pp.14a-19a). The Judge ruled that plaintiffs "have neither shown irreparable damage to them in the event the entire oath were eventually held to be unconstitutional nor shown a likelihood that the portions of the oath approved in the *Connell* case may eventually be held unconstitutional by the Supreme Court of the United States" (App. *infra*, p. 16a). An administrative directive from President O'Connell dated that same day indicated that the revised oath had to be executed by all employees on or before November 20, 1969 as a condition of receiving their salaries (App. *infra*, pp. 23a-24a).

An application for an injunction submitted to Mr. Justice Black was denied on November 19, 1969. It was resubmitted the next day to Mr. Justice Douglas who submitted it to the full Court. It was again denied. 90 S. Ct. 393.

Thereafter a three-judge court was convened, comprised of the same three Judges who ruled in *Connell*. On January 27, 1970 the three-judge court entered its judgment and memorandum. The court ruled that it had jurisdiction, that the plaintiffs had standing to bring the action and that it was properly a class suit (App. *infra*, pp. 9a-10a). The court further ruled that the appellees could condition employment and payment of salary on the execution of the revised loyalty oath; all other portions of the oath were declared unconstitutional. The dismissals of some plaintiffs for refusal to execute the modified oath was upheld. An appeal to this Court was docketed on March 5, 1970, it is now No. 105 in the October Term, 1970. A motion to dismiss or affirm was made on May 22, 1970.

Summary of Argument

Those two portions of the Florida loyalty statute and oaths upheld by the Court below infringe, on their face and as applied, the guarantees of freedom of expression, belief and privacy protected by the First and Fourteenth Amendments. The exacting of an oath that one does not "believe" in the overthrow of the government by force and violence is inconsistent with the teachings of this Court for almost a decade. See, e.g., *Cramp* v. *Board of Public Instruction of Orange County,* 368 U.S. 278; *Whitehill* v. *Elkins,* 389 U.S. 54. If there is anything which is completely protected by the constitutional guarantees flowing from the First Amendment, informed by the notion of privacy, it is the individual's right to *believe* anything he chooses. *Welsh* v. *United States,* 90 S. Ct. 1792, 1813 (White, J., dissenting); *Griswold* v. *Connecticut,* 381 U.S. 479; *Speiser* v. *Randall,* 357 U.S. 513, 536 (Douglas, J., concurring); *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624; *Cantwell* v. *Connecticut,* 310 U.S. 296. Accordingly, this oath is fatally defective under both components of the overbreadth doctrine. It proscribes acts which may not be proscribed, see *Keyishian* v. *Board of Regents of New York,* 385 U.S. 589, and it does so even though means less restrictive of fundamental liberties are available to pursue compelling, subordinating governmental interests. See *United States* v. *Robel,* 389 U.S. 258; *Shelton* v. *Tucker,* 364 U.S. 479. The so-called affirmative oath upheld below is not a mere symbolic amenity but is in effect a negative test oath which is an integral part of a comprehensive and repressive statutory scheme, and has

been so interpreted by the Florida Courts. Viewed as such, it is constitutionally infirm. *Elfbrandt* v. *Russell*, 384 U.S. 11; compare *Ex parte Garland*, 71 U.S. (4 Wall.) 333.

These oaths are unconstitutional abridgments on expression, belief and privacy for another set of reasons. Such test oaths, relics of another time, are indiscriminately imposed without any regard to the nature of the employee's position, despite this Court's insistence that government clearly demonstrate the compelling need for political inquiries. See, e.g., *Gibson* v. *Florida Legislative Investigative Committee*, 372 U.S. 539; *Keyishian* v. *Board of Regents, supra*. Test oaths have always been distrusted. They have little value in themselves and perhaps the only interest they advance is a symbolic show of strength to see how much irrelevant obedience the state can exact from its citizens.

These two oaths also violate due process because they are impermissibly vague and provide no opportunity for a clarification hearing or procedure. The operative terms are so uncertain that men must necessarily guess at their meaning. *Connally* v. *General Construction Co.*, 269 U.S. 385. Such vagueness is even more intolerable in the First Amendment area. *Baggett* v. *Bullitt*, 377 U.S. 360; *Speiser* v. *Randall, supra*.

Finally, the Court below incorrectly ruled that the portions of the statute and oath which it upheld were severable from those it struck down. The provisions are so intertwined in text and in purpose that the tainted portions cannot be severed.

ARGUMENT

POINT I

On their face and as applied, the portions of the Florida loyalty statute and oath declared not unconstitutional by the Court below, violate the First and Fourteenth Amendments' protection of the freedom of expression, belief, and privacy.

The District Court expressly ordered and adjudged that: "The following language of Section 876.05 of the Florida Statutes is constitutional, and the state may condition employment on the execution of an oath containing the following language:

> 'I, ..., a citizen of the State of Florida and of the United States of America and being employed by or an officer of ..... and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that [1] *I will support the Constitution of the United States and of the State of Florida; and* [2] *that I do not believe in the overthrow of the government of the United States or of the State of Florida by force or violence*'" (Jt. App., p. 153) (305 F. Supp. at 453). (Emphasis added.)

As a direct result of this ruling, the appellant and members of the class she represents are subject to precisely this oath as a condition precedent to public employment. See *Adams* v. *Board of Regents*, discussed in note 3, *supra*.

Especially in the context of this statute, each of these oath requirements unconstitutionally invades the freedoms of expression, belief and privacy.

A. *The Negative Loyalty Oath Validated by the Court Below Unconstitutionally Invades First Amendment Freedom and Is Overbroad*

The requirement of an oath in the form: "I do not believe in the overthrow of the government of the United States or of the State of Florida by force or violence" is clearly unconstitutional under the First and Fourteenth Amendments. The decision of the Court below is grossly inconsistent with the governing pronouncements of this Court on the meaning and scope of the First Amendment's freedoms of expression and belief.

The Court below proceeded from the notion that the State is free to limit employment opportunities on the basis of putative *beliefs* and only the putative *beliefs* of one who declines to execute a loyalty oath. Such an approach offends the most fundamental assumptions of a free society.[4] It also flies in the face of all the loyalty oath, internal security, and freedom of speech decisions rendered by this Court at least since 1961.[5] As Judge Simpson noted in dissent below:

> "This provision deals solely with *belief*, with what is in the mind and may remain there forever unexpressed

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[4] To the extent that the Court's decisions in *American Communications Ass'n* v. *Douds*, 339 U.S. 382 and *Osman* v. *Douds*, 339 U.S. 846 indicate a contrary principle, they are no longer controlling. See *United States* v. *Brown*, 381 U.S. 437.

[5] As to loyalty oath decisions, see *Cramp* v. *Board of Public Instruction of Orange County*, 368 U.S. 278; *Baggett* v. *Bullitt*, 377 U.S. 360; *Elfbrandt* v. *Russell*, 384 U.S. 11; *Keyishian* v. *Board of Regents*, 385 U.S. 589; *Whitehill* v. *Elkins*, 389 U.S. 54; *James* v. *Gilmore*, 389 U.S. 572, *affirming per curiam*, 274 F. Supp. 75 (N.D. Tex. 1967).

by word or deed. It does not deal with action. It does not even deal with spoken or written words advocating overthrow of government. Surely a teacher is entitled to his or her private, secret thoughts and beliefs. I view this attempt to regulate belief unattended by word or action as more clearly a violation of constitutional rights than provisions requiring an oath that the applicant does not belong to the Communist party, or that he does not belong to an organization listed as subversive by the Attorney General. In those cases belief has at least been acted upon to the extent of joining an organization." (Jt. App., p. 156) (305 F. Supp. at 455).

Judge Simpson's analysis is confirmed by this Court's most recent decisions on freedom of speech, which make it abundantly clear that even spirited advocacy of unlawful activity is immune from state sanction unless it constitutes "incitement to imminent lawless action." *Brandenburg* v. *Ohio*, 395 U.S. 444. See also, e.g., *Street* v. *New York*, 394 U.S. 576; *Watts* v. *United States*, 394 U.S. 705; *United States* v. *Robel*, 389 U.S. 258; *Kingsley Int'l Picture Corp.* v. *Regents*, 360 U.S. 684.

Mere belief, as yet unwedded to any action, not even speech, enjoys even greater protection than advocacy.[6]

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[6] "A citizen may be told when and where and in what manner he may or may not speak, write, assemble, and so on. On the other hand, he may not be told what he shall or shall not believe. In that realm each citizen is sovereign." Meiklejohn, *The First Amendment Is an Absolute*, 1961 S.Ct.Rev. 245, 257. For a more complete statement of the underlying argument, see Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 919-20 (1963).

This governing principle was refined in the freedom of religion cases; but it is equally applicable to the free speech and belief area. Mr. Justice White sensed the ubiquity of the principle when he dissented in *Welsh* v. *United States*, 90 S. Ct. 1792, 1813, "The [First] Amendment," he wrote, "protects belief and speech, but as a general proposition, the free speech provisions stop short of immunizing conduct from official regulation. The Free Exercise Clause has a deeper cut: it protects conduct as well as religious belief and speech. '[I]t safeguards the free exercise of the chosen form of religion. *Thus the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute* but, in the nature of things, the second cannot be.' *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-304 (1940)." (Emphasis added.) Numerous additional pronouncements of this Court make it perfectly clear that: "This conjunction of liberties is not peculiar to religious activity and institutions alone. The First Amendment gives freedom of mind the same security as freedom of conscience," *Thomas* v. *Collins*, 323 U.S. 516, 531. "[T]he domains of conscience and belief," Justice Douglas has said, "have been set aside and protected from government intrusion . . . *What a man thinks is of no concern to government.*" *Speiser* v. *Randall*, 357 U.S. 513, 536 (concurring opinion) (emphasis added). See also, *Sweezy* v. *New Hampshire*, 354 U.S. 234, 266 (Frankfurter, J., concurring). In *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 412, the Court recognized the constitutional requirement that "one be permitted to believe what he will," and Mr. Justice Black, in dissent, noted that "[i]ndividual freedom and governmental thought-probing cannot live together." *Id.* at 446. See also *Brandenburg* v. *Ohio*, 395 U.S. 444, 450 (Douglas, J., con-

curring); *Schneider* v. *Smith*, 390 U.S. 17, 25; *Torcaso* v. *Watkins*, 367 U.S. 488, 495-96; *Watkins* v. *United States*, 354 U.S. 178, 198; *United States* v. *Rumely*, 345 U.S. 41; *Girouard* v. *United States*, 328 U.S. 61, 68; *Schneiderman* v. *United States*, 320 U.S. 118, 144.

The notion that the First Amendment reserved certain areas free from governmental inquiry was well-established long before the now famous exposition of the right of privacy in *Griswold* v. *Connecticut*, 381 U.S. 479. Articulated most forcefully by Justice Brandeis, dissenting in *Olmstead* v. *United States*, 277 U.S. 438, 478, the constitutional protection results because the "makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against government, the right to be let alone —the most comprehensive of rights and the right most valued by civilized men." In *Stanley* v. *Georgia*, 394 U.S. 557, 564-65, this Court recently adopted Justice Brandeis's statement, and declared that: "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."

Perhaps the most comprehensive decision to plumb the First Amendment dimension of this right to privacy is the celebrated Flag Salute case, *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624. "To sustain the compulsory flag salute," the Court said, in terms singularly appropriate here,

> ". . . we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not [or for that matter what is] in his mind." *Id.* at 634.

The Court below sought to justify just such compulsion on the ground that "[w]hat a person believes has a central effect on the views and actions taken by that person" and the State has a peculiarly high interest, particularly at the primary school level, in neutralizing "the potential for the exertion of the principles of violent overthrow as a way of life [by school teacher-believers] on the younger, inferior mind . . . [of public school students]" (Jt. App., p. 152) (305 F. Supp. at 453).

But this kind of reasoning cannot justify such a massive invasion of the appellant's First Amendment rights. As this Court has observed: "That they [Boards of Education] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *West Virginia State Board of Education* v. *Barnett*, 319 U.S. 624, 637. Precisely because of the sensitivity and vulnerability of the classroom this Court repeatedly has reaffirmed the principle that "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian* v. *Board of Regents of New York*, 385 U.S. 589, 603. See also, e.g., *Wieman* v. *Updegraff*, 344 U.S. 183; *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250; *Barenblatt* v. *United States*, 360 U.S. 109, 112; *Baggett* v. *Bullitt*, 377 U.S. 360, 369; *Whitehill* v. *Elkins*, 389 U.S. 54, 59-60; *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503.

Because the Florida loyalty statute and oath invades the protected province of a man's private political beliefs, they suffer fatal defects under the overbreadth doctrine, which has two components. A law is overbroad when it proscribes acts "which legitimately may be proscribed" as well as acts "which may not be proscribed." *Keyishian* v. *Board of Regents of New York*, 385 U.S. 589, 609; see also, e.g., *United States* v. *Robel*, 389 U.S. 258, 267-68; *Schneider* v. *Smith*, 390 U.S. 17, 24; *Elfbrandt* v. *Russell*, 384 U.S. 11. A law is also overbroad, in violation of the First Amendment, if some means less restrictive of the essential democratic interest in free communication is available for government to pursue its other subordinating or paramount interests. See, e.g., *United States* v. *Robel, supra; Shelton* v. *Tucker*, 364 U.S. 479, 488; *Schneider* v. *Smith, supra; United States* v. *O'Brien*, 391 U.S. 367, 376-77. The Florida loyalty statute and oaths suffer from both defects of overbreadth.

They are unconstitutional under the first aspect of the doctrine to the extent that they penalize mere beliefs rather than affirmative unlawful actions or at the very least advocacy which constitutes incitement to imminent unlawfulness. See, e.g., *Brandenburg* v. *Ohio*, 395 U.S. 444. In addition, they reach much too far in proscribing belief in "the overthrow of the Government of the United States or the State of Florida by force or violence" without regard to context. This overbreadth becomes all the more gross in light of the dispositive ruling by the highest court of Florida that this undertaking was designed "to prevent . . . employment of . . . employees who . . . subscribe to a doctrine of accomplishing a change in government by the employment of force and violence." *Cramp*

v. *Board of Public Instruction of Orange County*, 137 So. 2d 828, 830 (Fla. 1962). Cf., e.g., *Scales* v. *United States*, 367 U.S. 203; *Noto* v. *United States*, 367 U.S. 290; *Yates* v. *United States*, 354 U.S. 298.[7]

The Florida statute and oaths are unconstitutional under the second aspect of the overbreadth doctrine as well. The state cannot sustain its burden of demonstrating that no less restrictive means are available to accomplish its subordinating purpose.[8] The only paramount interests discovered by the District Court to justify imposition of this restriction were "the state's legitimate interest in educating youth and in the teaching of the principles of ordered government and the orderly process for change" (Jt. App. p. 152) (305 F. Supp. at p. 453). But this Court recently

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[7] In a Task Force Report submitted to the National Commission on the Causes and Prevention of Violence, Jerome Skolnick, Director of the Task Force, observes:

> "The proposition that domestic political violence has been unnecessary to achieve political goals is ambiguous, but it is historically fallacious no matter how one interprets it. If it means that the established machinery has permitted major 'out-groups' to move nonviolently up the politicoeconomic ladder, it is demonstrably false. . . .
>
> Similarly, the proposition is false if it means that the establishment is self-transforming, in that groups in power will always or generally share that power with newcomers without the pressure of actual or potential violence." Skolnick, *The Politics of Protest* 15-16 (Ballantine ed. 1969).

Could Mr. Skolnick conscientiously make this oath?

[8] If the State must demonstrate that it has even a reasonable chance of accomplishing its end through this kind of loyalty testing, it cannot prevail. Professor Emerson has aptly described this particular demonstration in futility: "The effort to suppress belief can rarely be successful. It cannot change opinions or substitute better ones. It affects chiefly those among the unorthodox who are men of principle and, by encouraging concealment and deception, destroys the whole basis of public morality." Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 919 (1963).

ruled that teachers who do not subscribe to "the principle of orderly government and the orderly process for change" (whatever that may mean) "may not be cast into the outer darkness." *Whitehill* v. *Elkins*, 389 U.S. 54, 57. Moreover, it is difficult to understand how these restrictions facilitate "educating youth" unless the District Court meant providing exposure (or is it indoctrination?) only to orthodox ideas.[9] Obviously, such an interest cannot survive

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[9] Fla. Stat. Ann §233.064 would indicate that the State's purpose was indoctrination and continued surveillance. (Cf. *Keyishian* v. *Board of Regents*, 385 U.S. 589):

"233.064 Americanism vs. communism; required high school course.—

"(1) The legislature of the state hereby finds it to be a fact that

"(a) The political ideology commonly known and referred to as communism is in conflict with and contrary to the principles of constitutional government of the United States as epitomized in its national constitution,

"(b) The successful exploitation and manipulation of youth and student groups throughout the world today are a major challenge which the free world forces must meet and defeat, and

"(c) The best method of meeting this challenge is to have the youth of the state and nation thoroughly and completely informed as to the evils, dangers and fallacies of communism by giving them a thorough understanding of the entire communist movement, including its history, doctrines, objectives and techniques.

"(2) The public high schools shall each teach a complete course of not less than thirty hours, to all students enrolled in said public high schools entitled 'Americanism versus communism.'

"(3) The course shall provide adequate instruction in the history, doctrines, objectives and techniques of communism and shall be for the primary purpose of instilling in the minds of the students a greater appreciation of democratic processes, freedom under law, and the will to preserve that freedom.

"(4) The course shall be one of orientation in comparative governments and shall emphasize the free-enterprise-competi-

(*continued on next page*)

First Amendment scrutiny. To the extent that state has an interest in assuring "the teaching of the principles of ordered government and the orderly process for change," surely it can do so without infringing upon contrary beliefs by some teachers or even limiting instruction to that principle as though it were immutable. And to the extent that the state has a legitimate interest in keeping teachers from indoctrinating grade school, secondary school, or college students with a contrary principle, the state can serve that interest without invading the First Amendment province of individual beliefs and advocacy. The state might

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tive economy of the United States as the one which produces higher wages, higher standards of living, greater personal freedom and liberty than any other system of economics on earth.

"(5) The course shall lay particular emphasis upon the dangers of communism, the ways to fight communism, the evils of communism, the fallacies of communism, and the false doctrines of communism.

"(6) The state textbook committee and the state board of education shall take such action as may be necessary and appropriate to prescribe suitable textbook and instructional material as provided by state law, using as one of its guides the official reports of the house committee on un-American activities and the senate internal security sub-committee of the United States congress.

"(7) No teacher or textual material assigned to this course shall present communism as preferable to the system of constitutional government and the free-enterprise competitive economy indigenous to the United States."

A provision included in the 1969 Florida General Appropriations Bill, prohibits any payment of appropriated monies for the benefit of any employee or student who advocates the overthrow of the federal or state government or a state university administration, by force and violence, or who willfully practices, or advocates with clear intent, the disruption of or interference with the lawful administration or functions of any state university or college. *See* Gonzalez, *State Laws of 1969 Dealing with Student Unrest* (Nov. 5, 1969. Mimeo. Nat'l Ass'n of State Universities and Land-Grant Colleges).

see to it that instruction is received in the principle of orderly government and processes;[10] conceivably, within very clear and strict limits, it might sanction purposeful and one-sided indoctrination of students in contrary principles.[11] Cf. *United States* v. *Robel*, 389 U.S. 258, 266-267.

B. *The Affirmative Loyalty Oath Validated by the Court Below Unconstitutionally Invades First Amendment Freedoms and Is Overbroad*

The second of the provisions upheld by the District Court requires applicants for public employment to "solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida." On its face this provision is similar to the oath of office prescribed in the United States Constitution, Art. II, §1, para. 8 and Art. VI, para. 3 (see *Bond* v. *Floyd*, 385 U.S. 116, 135-36), and to the affirmative oaths left standing by this Court in the recent New York and Colorado cases. *Knight* v. *Board of Regents*, 269 F. Supp. 339 (S.D.N.Y. 1967), *aff'd mem.*, 390 U.S. 36; *Hosack* v. *Smiley*, 276 F. Supp. 876 (D. Colo. 1967), *aff'd mem.*, 390 U.S. 744; *Ohlson* v. *Phillips*, 304 F. Supp. 1152 (D. Colo. 1969), *aff'd mem.*, 397 U.S. 317. Nevertheless, this Court should subject the Florida provision to plenary review and declare it to be in violation of the First Amendment.

Florida's affirmative loyalty oath, unlike others the Court may have considered, is "more than an amenity," *Cole* v. *Richardson*, 397 U.S. 238, 240 (Harlan, J. and Burger, C.J., concurring), it is not a mere symbolic and public declaration of fidelity to the Constitution. It is

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[10] See Fla. Stat. Ann. §233.064.

[11] Surely, Fla. Stat. Ann. §233.064(7) could *not* pass muster.

really a negative test oath masquerading as an affirmative oath of office. The statute which prescribes this oath reveals full well that it is an integral part of a comprehensive, repressive program designed to invade the privacy of the oathtaker's mind, and unconstitutionally to restrict his beliefs, utterances, and associational activities. This so-called oath of office is bracketed into a statute which on its face contained four additional negative test oath requirements, each of which unconstitutionally invaded First Amendments rights. The provisions of that statute (Fla. Stats. Ann. §§876.05-876.10) are themselves found in the middle of Chapter 876 of the Florida Statutes Annotated, which consists of 31 somewhat interrelated sections, each dealing with some aspect of "Criminal Anarchy, Communism, Wearing of Masks, Hoods, Etc." As the Supreme Court of Florida dispositively ruled:

> "The obvious legislative purpose in enacting the subject statute was to prevent the election or employment of public officials and employees who are knowingly disloyal to the government of the United States or to the State of Florida and who subscribe to the doctrine of accomplishing change in government by the employment of force and violence." *Cramp* v. *Board of Public Instruction of Orange County*, 137 So.2d 828, 830 (Fla. 1962).[12]

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[12] In *Elfbrandt* v. *Russell*, 384 U.S. 11, a putatively affirmative oath was given a similar negative gloss by the legislature and the State's highest court. This Court treated the oath as though it were a negative (or disclaimer) oath and declared it unconstitutional. On the other hand, the oath and provision in the latest Colorado case, *Ohlson* v. *Phillips*, 304 F. Supp. 1152 (D. Colo. 1969), *aff'd mem.*, 397 U.S. 317, for example, seem to have no disclaimer context or negative gloss.

Further the District Court upheld this remaining oath for precisely the same reasons it upheld the "belief" provision.

The single remaining oath provision should be read *in pari materia* with its neighboring provisions; it should be evaluated in that statutory context, not in isolation. Compare, e.g. *Keyishian* v. *Board of Regents,* 385 U.S. 589; *Whitehill* v. *Elkins,* 389 U.S. 54, *on remand,* 287 F. Supp. 61 (D. Md. 1968). When viewed in this context, the affirmative oath provisions must be voided for all of the reasons elaborated in the opinions of this Court, and in the District Court opinion striking down three of the "negative" clauses, and already suggested in this brief for striking down the fourth and remaining "negative clause". Compare *Richardson* v. *Cole,* 300 F. Supp. 1321 (D. Mass. 1969), *vacated and remanded for a determination of mootness,* 397 U.S. 238, in which an entire statute prescribing two oaths, one negative and the other affirmative, was voided although the court addressed only the unconstitutionality of the negative oath.

On the surface, this argument my seem to be inconsistent with the approach taken by this Court in *Ex parte Garland,* 71 U.S. (4 Wall.) 333. At issue in that case was an Act of Congress which prescribed a loyalty oath for attorneys in the following form:

> "1st. That the deponent has never voluntarily borne arms against the United States since he has been a citizen thereof;
>
> "2d. That he has not voluntarily given aid, countenance, counsel or encouragement to persons engaged in armed hostility thereto;
>
> "3d. That he has never sought, accepted or attempted to exercise the functions of any office what-

soever, under any authority or pretended authority in hostility to the United States;

"4th. That he has not yielded a voluntary support to any pretended government, authority, power or constitution, within the United States, hostile or inimical thereto; and,

"5th. That he will support and defend the Constitution of the United States against all enemies, foreign and domestic, and will bear true faith and allegiance to the same." 71 U.S. (4 Wall.) at 376.

The Court responded to this juxtaposition of affirmtive and negative provisions by declaring that: "This last clause is promissory only, and requires no consideration. The questions presented for our determination arise from the other clauses. These all relate to past acts." *Id.*

This decision is not controlling here. Garland was not pressing a First Amendment claim; he did not bridle at taking the oath because it invaded his rights to privacy and political freedom. He challenged the oath on the ground that it was a bill of attainder and an *ex post facto* law and invaded the President's pardoning power. Congress had established the requirement to bar adherents of the Confederacy from practicing law in the Courts of the United States. Garland had been a member of the Confederate legislature. Hence it was not for want of will, but for want of ability that he could not truthfully execute the negative oaths. The affirmative oath was within his power to execute. His argument and the Court's opinion, were focused entirely on the retrospective character of the disability. The promissory oath did not fit within the parameters of either the legal doctrines or the facts to

which they were being applied. Indeed, in terms of Garland's claim, the promissory oath was no disability at all.

The situation is quite different in the instant case. The appellant is not pursuing a bill of attainder or an *ex post facto* claim. Her claim is rooted in First Amendment. And especially when read with the negative disclaimers, the affirmative oath dangerously invades her privacy and her political freedom. The promissory character of the oath increases the danger to these rights, for it "would apply to future as well as past conduct." See *Cramp* v. *Board of Public Instruction of Orange County*, 137 So.2d 828, 830 (Fla. 1962). After all, "A 'violation' of . . . [a statute such as the present one], which presumably means a failure to 'live up' to the oath, since its phraseology is in the future tense, is a felony." [13] *Richardson* v. *Cole*, 300 F. Supp. 1321, 1322 (D. Mass. 1969), *vacated and remanded*, 397 U.S. 238; accord, 397 U.S. at 242 (Douglas, J., dissenting). Unless the promissory undertaking is both definite and narrow, its *in futuro* effect can place the oath-taker in criminal jeopardy for acts not forseeable at the time he takes the oath.[14] Such an oath cannot be consistent with the First Amendment and due process. See *Keyishian* v. *Board of Regents*, 385 U.S. 589, 601-02; *United States* v. *Robel*, 389

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[13] Fla. Stats. Ann. §876.10 punishes as perjury the making of false oaths. See *State* v. *Diez*, 97 So.2d 105 (Fla. 1957). On the significance of the perjury sanction, see *Elfbrandt* v. *Russell*, 384 U.S. 11; *Baggett* v. *Bullitt*, 377 U.S. 360, 373-74; *Georgia Conf. of AAUP* v. *Board of Regents*, 246 F. Supp. 553, 555 (N.D. Ga. 1965).

[14] *'Yet sworn word may strengthen quacking hearts'* said Gimli. *'Or break it'* said Elrand. *'Look not too far ahead! But go now with good hearts . . .'* TOLKIEN, LORD OF THE RINGS, Vol. I, p. 294 (2nd ed. 1967).

U.S. 258, 276; *cf. Marchetti* v. *United States*, 390 U.S. 39, 53, where the Court rejected " . . . the premise that the privilege [against self-incrimination] is entirely inapplicable to prospective acts. . . ."

In light of its statutory context, and gloss given to it by the Supreme Court of Florida,[15] the affirmative oath cannot possibly satisfy First Amendment requirements. Analyzed in this context, Florida's promissory oath requirement is the functional equivalent of the federal oath, recently declared unconstitutional, that "applies to one who advocates overthrow in the distant future, as well as in the present or near future." *Stewart* v. *Washington*, 301 F. Supp. 610, 612 (D. D.C. 1969).

C. *Indiscriminately Required Loyalty Oaths Unconstitutionally Abridge the Freedoms of Expression, Belief and Privacy*

The phrase "I do not believe in the overthrow of the government of the United States or of the State of Florida by force or violence" constitutes a negative loyalty oath. Beginning with the 1961 decision in *Cramp*, the predecessor of this case, each such test oath to come before this Court has been found to be in violation of the Frst Amendment. See *Cramp* v. *Board of Public Instruction of Orange County*, 368 U.S. 278; *Baggett* v. *Bullitt*, 377 U.S. 360; *Elfbrandt* v. *Russell*, 384 U.S. 11; *Keyishian* v. *Board of Regents*, 385 U.S. 589; *Whitehill* v. *Elkins*, 389 U.S. 54; *James* v. *Gilmore*, 389 U.S. 572, *affirming per curiam*, 274 F. Supp 75 (N.D. Tex. 1967). Further, the decision of the Court below is the only one, since this Court's ruling in the

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[15] *Cramp* v. *Board of Public Instruction of Orange County*, 137 So.2d 828, 830 (Fla. 1962), quoted *supra*, p. 24.

Whitehill case, by which a state or inferior federal court upheld a negative loyalty oath (or authorizing statute) for public employees. Compare, e.g., *Vogel* v. *County of Los Angeles*, 68 Cal.2d 18, 434 P.2d 961, 64 Cal. Rptr. 409 (1967); *Whitehill* v. *Elkins*, 287 F. Supp. 61 (D. Md. 1968); *Haskett* v. *Washington*, 294 F. Supp. 912 (D. D.C. 1968); *Stewart* v. *Washington*, 301 F. Supp. 610 (D. D.C. 1969); *Thalberg* v. *Board of Trustees of the Univ. of Illinois*, 309 F. Supp. 630 (N.D. Ill. 1969).[16]

All such disclaimers or negative loyalty oaths, cast in political terms, offend the First and Fourteenth Amendments' freedoms of expression, belief, and privacy. Even the clearest and most precise disclaimer imaginable would be unconstitutional, particularly when demanded indiscriminately of all government employees or beneficiaries.

Such disclaimers are classical test oaths, relics of times when the individual stood not as citizen, but as servant or chattel, of the state or sovereign. Historically, these disclaimers have been particularly distasteful to Americans. Asper, *The Long and Unhappy History of Loyalty Testing in Maryland*, 13 Am. J. Leg. Hist. 97 (1969); Hyman, To Try Men's Souls (1960). Unlike affirmative declarations to support the Constitution, they have no textual basis in that document. Compare U.S. Const. Art II, §1; Art. VI, para. 3. See *Bond* v. *Floyd*, 385 U.S. 116; *Stewart* v. *Washington*, 301 F. Supp. 610, 612 (D. D.C. 1969).

"Our Constitution contains a specific provision recoiling from the odious test oaths that emerged in Britain in the 17th century, and which disqualified from pub-

[16] But cf. *Law Students Civil Rights Research Council, Inc.* v. *Wadmond*, 299 F. Supp. 117, 125-27 (S.D.N.Y. 1969), *probable juris. noted*, 396 U.S. 999.

lic office all Catholics and non-conformists not subscribing to the doctrines of the Church of England. That provision is Article VI which provides: 'No religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.'" *Stewart* v. *Washington*, 301 F. Supp. at 611.

Loyalty disclaimers are especially incidious in that they put the oath-taker to the odious and impossible task of declaring or demonstrating a negative—that he is *not*, in effect; disloyal. See *Bently Glass on Test Oaths*, 46 AAUP Bull. 290-291 (Autumn 1960). They place burdens of persuasion and proof on the oath-taker. They are formulated in such a way as to presume the guilt and disloyalty of all persons. Only if the affiant comes forward and executes the expurgatory oath may he become a member of the favored group. In other words, disclaimers presume disability and then shift to the affiant the burdens of going forward, cf. *Lamont* v. *Postmaster General*, 381 U.S. 301, and of proof and persuasion, see *Speiser* v. *Randall*, 357 U.S. 513. Such a procedure derogates the First Amendment, see *Elfbrandt* v. *Russell*, 384 U.S. 11, 17-18; cf. e.g., *Schneider* v. *Smith*, 390 U.S. 17, 27 (Fortas, J., concurring), as reinforced by the Fifth Amendment's privilege against self-incrimination, see, e.g., *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70; cf. e.g., *Garrity* v. *New Jersey*, 385 U.S. 493; *Spevak* v. *Klein*, 385 U.S. 511.

Indiscriminate test oaths, like those required by the State of Florida, especially violate important First Amendment principles. This Court has made it unmistakable that before response can be required to political inquiries the government must meet a heavy burden of demonstrating the

relevance of its questions. Cf. *Gojack* v. *United States*, 384 U.S. 702; *DeGregory* v. *Attorney General*, 383 U.S. 825; *Gibson* v. *Florida Legislative Investigative Committee*, 372 U.S. 539. And it may not, as the Florida oath does, make an inquiry "which blankets all . . . employees, regardless of the 'sensitivity' of their positions." *Keyishian* v. *Board of Regents*, 385 U.S. 589, 607; accord, *United States* v. *Robel*, 389 U.S. 258.

The principles to be applied, in evaluating both "appropriateness" of the inquiries (or oaths) and the "sensitivity" of position, are well established. First, "[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." *Bates* v. *City of Little Rock*, 361 U.S. 516, 524. Second, "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker*, 364 U.S. 479, 488.

In recently passing upon inquiries required pursuant to a federal loyalty-security program, Justice Douglas declared that in *Shelton* "we held that an Act touching on First Amendment rights must be narrowly drawn so that the precise evil is exposed . . . ." *Schneider* v. *Smith*, 390 U.S. 17, 24 (1968); see also *id.* at 27-28 (concurring opinion). And in *United States* v. *Robel*, 389 U.S. 258, 267-68 (1967), it was squarely held with respect to a federal loyalty-security provision that:

> "Our decision today simply recognizes that, when legitimate legislative concerns are expressed in a stat-

ute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms."

Again, in *Keyishian v. Board of Regents*, 385 U.S. 589, 609 (1967), the Court invalidated a state restriction on the public employment of members of the Communist Party where the restriction applied even to persons neither actively engaged in any of the Party's illegal objectives nor shown to harbor a specific intention of supporting such objectives by unlawful conduct:

> "They [the invalid state laws] seek to bar employment both for association which legitimately may be proscribed and for association which may not be proscribed consistently with First Amendment rights. Where statutes have an overbroad sweep, just as where they are vague, 'the hazard of loss or substantial impairment of those precious rights may be critical,' *Dombrowski v. Pfister, supra,* [380 U.S. 479] at 486, since those covered by the statute are bound to limit their behavior to that which is unquestionably safe."

Compelled extraction of the Florida text oath from all employees and applicants for appointment cannot survive the tests of "appropriateness" of inquiry and "sensitivity" of position. They impose, with neither necessity nor justification, too substantial a burden on First Amendment rights. First, the oaths and limitations at issue here are not appropriate to the qualifications of all conceivable kinds of government employees; and the vast majority of the positions to be filled are not security sensitive. Cf.

Cole v. *Young*, 351 U.S. 536. Second, the government has means less stultifying to First and Fifth Amendment rights to achieve any subordinating interest. It may make it a criminal offense to engage in acts designed to overthrow the government by force or violence. It may even punish conspiracies to engage in such acts, and may require the terminal discharge of employees who knowingly commit acts in furtherance of any such conspiracy. It may not, however, broadly curtail the freedom of association, speech and assembly of all its employees because of an overzealous concern with the possibility of such unlawful conspiracies. See *DeJonge* v. *Oregon*, 299 U.S. 353, 365-66.

Appellant submits that Florida's indiscriminate requirement of the affirmative loyalty oath is subject to the same First Amendment tests as is the disclaimer. But see *Knight* v. *Board of Regents*, 390 U.S. 36; *Hosack x. Smiley*, 390 .U.S. 744; *Ohlson* v. *Phillips*, 397 U.S. 317. Except where constitutionally mandated, expressly or by fair implication, all affirmative oaths are constitutionally suspect. They are really variations on the theme of the classical test oath.

Sometimes they are used, much to the detriment of our political society, unjustifiably to single out individuals or groups to test their loyalty. Professor Asper reported that members of the Maryland legislature, who were imprisoned arbitrarily at the start of the Civil War, were required to execute a test oath as the condition to their release.

> "For the stubborn Marylanders this was entirely a matter of principle. The oath tendered to them was, in present day terminology, an 'affirmative' oath.

> They were not asked to disavow any past actions, sympathies or beliefs. They were asked simply to promise to support and defend the Constitution of the United States. What they objected to was being singled out as objects of suspicion. They challenged the power of the government to pick them out and demand that they stand before the rest of the community and 'prove' their loyalty by swearing to a special oath. This they regarded as an affront to their integrity and their standing as free citizens." Asper, *The Long and Unhappy History of Loyalty Testing in Maryland*, 13 AM. J. LEG. HIST. at 104.

Affirmative oaths are equally harmful when they are required indiscriminately, say of all government employees, without any relation to substantive governmental needs. The symbolic role played by the oaths of office mandated in the federal Constitution for high government officials becomes attenuated to the point of irrelevance when all employees, not just officers, of the government are compelled to swear the oath. Such oaths, even when cast as simply as the Florida oath, are used, like disclaimers, for purposes of repression. As we have demonstrated, Florida's affirmative oath is really a disclaimer in this disguise. See, *supra*, pp. 9-10 n. 3. This was no accident. It is in the nature of the indiscriminate affirmative oath.[17]

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[17] This Court, and other courts, have passed upon many such oaths that were not so subtly disguised. See *Elfbrandt* v. *Russell*, 384 U.S. 11; *Baggett* v. *Bullitt*, 377 U.S. 360; *Richardson* v. *Cole*, 300 F. Supp. 1321 (D. Mass. 1969), *vacated and remanded*, 397 U.S. 238; *Pedlosky* v. *Massachusetts Institute of Technology*, 352 Mass. 127, 224 N.E.2d 414 (1967); *Gallagher* v. *Smiley*, 270 F. Supp. 86 (D. Colo. 1967).

"Resistance to . . . [test oaths] is incomprehensible to many citizens," reported Professor Asper:

> "The question, 'Why a loyalty oath?' invariably brings the response, 'Why not? What harm can it do? If one is not a subversive person or is not a member of a subversive organization, why should he object to signing a piece of paper attesting to that fact?'" Asper, *The Long and Unhappy History of Loyalty Testing in Maryland*, 13 AM. J. LEG. HIST. 97, 97-98 (1969).

The answers are obvious enough:

> "The long history of loyalty testing . . . demonstrates that . . . [it] has a capacity for self-nourishment; that it may grow fortuitously and arbitrarily, at times providing a mask for the most disagreeable instincts and prejudices. It is a political weapon susceptible to cynical uses and, so used, may create suspicion, ill-feeling and ugliness among citizens and neighbors. Finally, the doleful fact is that loyalty testing, more often than not, punishes persons who place a high value on personal integrity and individual rights while failing entirely to apprehend those who would injure the society it purports to protect." *Id.* at 98; see also, e.g., Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 919-920, 942 (1963); R. O'NEIL, THE PRICE OF DEPENDENCY 87-88 (1970); *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 445-453 (Black, J. dissenting).

The facts in this case, and the companion case (*Adams* v. *O'Connell*), demonstrate the point. Appellant who was hired to be a teacher; she functioned satisfactorily in that

capacity. She had been in the classroom for more than a week before she was put to her loyalty test. The test first imposed upon her had been declared unconstitutional by this Court eight years earlier. Because she would not execute the oath, or one that was modified, she was discharged—denied her pay and entry to the classroom.

The plaintiffs in the *Adams* case were personnel of the University of Florida. On October 16, 1969, nearly two months after the academic year had commenced, the President of the University required each employee of the University to execute a loyalty oath, regardless of whether or not his personal file already contained a valid oath. The purpose of this demand was "to insure that each personnel file contains a loyalty oath that is properly worded and notarized as required by the Florida Statutes . . ." App., *infra*, p. 20a. The plaintiffs sued rather than execute this oath. The Court below upheld the suit but validated so much of the oath as is at issue here. Three persons who declined to execute the judicially amended oath were discharged and denied their pay.

Real interests are at stake in this case. Real interests are always at stake when the state seeks to impose loyalty tests. See, generally, Mr. Justice Black's dissenting opinion in *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 445-453. People can lose jobs; they can lose benefits; they can lose property. Frequently, the interests are even greater than the right to hold a job or to receive one's pay. Frequently, a man's life or physical liberty is at stake. See generally, Asper, *supra*, 13 Am. J. Leg. Hist. 97.

If we put aside the material injuries that can result to people because of text oath requirements, the oath itself

is probably not a significant matter. The words may be few and recitation may not be onerous. The non-psychological burdens on the individual are not great; they are no greater, perhaps, than those resulting from compulsion to salute the flag or to recite a prayer in public school. See *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624; *School District of Abington Township* v. *Schempp*, 374 U.S. 203. By the same token, the state's substantive gain from the imposition of a test oath is negligible. No subversive or disloyal person will chaff at a test oath. See, e.g., *Bently Glass on Test Oaths, supra;* Asper, *supra;* Emerson, *supra.* They will not be screened out in this fashion; especially since at the time the oath is taken the state is "not authorize[d] . . . to test the sincerity with which" it is taken. *Bond* v. *Floyd*, 385 U.S. 116, 132. The test oath is, like the yellow dog contract, designed not to entrap or screen-out but to humiliate.

The issue of the test oath tends to refine itself to the vanishing point; it becomes a contest between the state and the citizen over something that, in and of itself, has no substantive importance. It is like the Battle of Pork Chop Hill, which was fought at the close of the Korean War, or the battle of Hamburger Hill recently fought in Viet Nam. The hill itself was unimportant. The battle became a pure contest over each side's resolve, power and principle. How much was each side willing to expend over something which itself lacked intrinsic worth? Thus the test oath controversy can be seen as a contest between the state and the citizen, and it concerns the fundamental freedoms.[18] The issue is clear: How free may the citizen insist upon being, even about matters that are unimpor-

[18] Cf. e.e. cummings' poem "i sing of Olaf glad and big."

tant; and how much irrelevant restraint may the state impose upon him."[18a]

Appellant submits that the citizen should win this contest. Justice Jackson's formulation of the controlling principle cannot be improved upon:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 642. See also, Mr. Justice Black's dissenting opinion in *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 445-53.

POINT II

On their face and as applied, Florida's two statutory and oath provisions, which were left standing by the Court below, violate the Due Process clause of the Fourteenth Amendment in that they are unduly vague and provide no opportunity for clarification hearing or procedure.

A "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally* v. *General Construction Co.*, 269 U.S. 385,

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[18a] The philosophical absurdity of the contest, and the State's lack of a real reason to require test oaths, is well revealed in Joseph Heller's remarkable novel, CATCH-22 (1961), pp. 110-116.

391; *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453; *Winters* v. *New York*, 333 U.S. 507, 515. Indefinite oath statutes have a special vice. Not only are they impermissibly vague, but in their vagueness they "abut upon sensitive areas of basic First Amendment freedoms. The uncertain meanings of the oaths require the oath-taker . . . to 'steer far wider of the unlawful zone,' *Speiser* v. *Randall*, 357 U.S. 513, 526 . . . , than if the boundaries of the forbidden area were clearly marked." *Baggett* v. *Bullitt*, 377 U.S. 360, 372. Imprecision in an oath "makes possible oppressive or capricious application as regimes change."[19] These further aggravations of the vice of vagueness demand application of the strictest standard, lest the free dissemination of ideas be the loser. E.g., *Cramp* v. *Board of Public Instruction of Orange County, supra*, 368 U.S. at 287; *Smith* v. *California*, 361 U.S. 147, 151; *Whitehill* v. *Elkins*, *supra*.

Certainly the gloss, placed upon the statute and the oaths, by the Supreme Court of Florida, 137 So.2d at 830, quoted in full *supra* at p. 24, reveals substantial problems of vagueness. The oath-taker cannot reasonably know what is meant by the requirement that he be "knowingly loyal to the government of the United States or to the State of Florida . . . " What does loyal mean? Must he be loyal to the form of government or to the officials who at any given time may comprise the government? If he vocally disagrees with the Chamber of Commerce image of Florida as a citrus and vacation paradise, is he being disloyal "to the State of Florida"?

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[19] *Whitehill* v. *Elkins*, 389 U.S. 54, 62; see also, *Baggett* v. *Bullitt*, 377 U.S. 360, 373; *NAACP* v. *Button*, 371 U.S. 415, 432-433; *Cramp* v. *Board of Public Instruction of Orange County*, 368 U.S. 278, 286-287.

The oath-taker also cannot know what is meant by the requirement that he not "subscribe to the doctrine of accomplishing a change in government by the employment of force and violence." What does it really mean to subscribe? What is meant by a change? Does this mean that the oath-taker must believe "that domestic violence has been unnecessary to achieve political goals . . . ? Compare Skolnick, *The Politics of Protest* 15-16 (Ballantine ed. 1969) quoted in full, p. 20 n. 7.

It is impossible to know what is meant by the declaration "I do not believe in the overthrow of the Government . . . by force or violence."[20] Initially, the oath-taker does not know what the statute and oath contemplate by "believe in." Does it include speculative or tentative belief? Commitment to the policy of violent overthrow? Approval of violent overthrow or violent political acts, under any or all circumstances? See Skolnick, *supra*, p. 20 n. 7. As already noted, it is not at all clear that government may proscribe or scrutinize these or any other such beliefs *qua* beliefs. Even if beliefs can be restricted with sufficient certainty, an oath-taker does not know what is contemplated by the phrase "overthrow of the Government." Does this mean an individual may not believe in the violent overthrow

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[20] Compare *Keyishian* v. *Board of Regents*, 385 U.S. 589, 593, voiding for vagueness the phrase, "utterance of any treasonable or seditious act"; *Baggett* v. *Bullitt*, 377 U.S. 360, 371-72, voiding as vague the phrase "respect for the flag and institutions of the United States . . . and undivided allegiance to the government of the United States"; *Gallagher* v. *Smiley*, 270 F. Supp. 86 (D. Colo. 1967, invalidating as vague an oath requiring teachers to promise that they will "teach, by precept or example, respect for the flags of the United States and of the state of Colorado, respect for law and order and undivided allegiance to the government of one country, the United States of America". See Colo. Rev. Stat. 1963, ch. 123, art. 17, §§6-8.

of a tyrannical government that has come to power by unlawful and violent means and has suspended or discarded the Constitution? If not, what does it mean? Cf. *Richardson* v. *Cole*, 300 F. Supp. 1321 (D. Mass. 1969) *vacated and remanded*, 397 U.S. 238, voiding for vagueness a loyalty statute containing the phrase "I will oppose the overthrow of the government . . . "

Particularly when viewed in the context of the total statute, as Judge Simpson recognized dissenting below, the requirement that a public employee must swear to "support the Constitution of the United States and the State of Florida" is also so vague that few persons of common intelligence will agree upon the obligations which the oath imposes. The range of activities which might reasonably be deemed to be inconsistent with the affirmative oath, in its negative statutory context, is so broad in scope that a conscientious affiant could reasonably fear that he is asked to refrain from unascertainable areas of constitutionally protected speech and assembly. It is possible, for example, that the phrase "support the Constitution" may mean the avoidance of any categorically direct violation. Perhaps, more plausibly, the phrase requires avoidance of open and active criticism of the form of government established by the Constitution or of any advocacy to overthrow the government. If such is the meaning of the phrase, the statute purports to proscribe activities which include constitutionally protected speech. This Court has clearly ruled that not all advocacy, but only advocacy constituting incitement to imminent lawlessness, may be proscribed or limited by government. See, e.g., *Brandenburg* v. *Ohio*, 395 U.S. 444; *Yates* v. *United States*, 354 U.S. 298; *Noto* v. *United States*, 367 U.S. 290. At the very least, the term, if it has

any meaning at all in this context, proscribes "alteration of . . . the constitutional form of government of the United States" and the State of Florida, a compulsory undertaking which this Court recently held to violate the Constitution. *Whitehill* v. *Elkins*, 389 U.S. 54, 57.

The vices which prompted this Court to strike down oaths and statutes in *Speiser, Cramp, Baggett, Elfbrandt, Keyishian,* and *Whitehill, supra,* are all present in the Florida statute and affirmative oath. The conscientious teacher who takes the oath cannot but be deterred from exercising First Amendment rights guaranteed to him by the very Constitution he has sworn to support. The oath, in this statutory context, must fall because teachers "of character and integrity may well forgo their calling rather than risk prosecution for perjury or compromise their commitment to intellectual and political freedom. . . ." *Elfbrandt* v. *Russell*, 384 U.S. 11, 18. The oath and statute must fall because: "We are in the First Amendment field. The continuing surveillance which this type of law places on teachers is hostile to academic freedom." *Whitehill* v. *Elkins*, 389 U.S. 54, 59-60.

The danger of vagueness in the Florida oath requirements is magnified by the fact that the statute provides for no mechanism by which the oath-taker may receive clarification of the oath. Under Fla. Stats. Ann. §§876.05-876.10, the prospective employee for whom negotiations are complete, save for the oaths (as was the case of the appellant), is given no opportunity to prove his loyalty or explain his reasons for refusing to sign the oaths. If he fails to sign at such a late stage, not only does he forfeit a position for which he is otherwise qualified or forfeit pay for work performed, but even more seriously, he suffers the

stigma of having balked at the oath, however scrupulous may have been his reasons.[21] This is precisely the situation in which the Appellant, and the plaintiffs in *Adams*, find themselves. The absence of such a procedure is equally harsh on the prospective employee who discovers the oath early in his quest for a government position; after such a discovery, he is unlikely to reach the stage at which he could even challenge the constitutionality of the oath requirement, as the appellant has done here. As Judge Wright suggested in a case very similar to the one under review, "I believe that such a result is inconsistent with the rigorous due process standards which govern the regulation of speech and association." *Haskett* v. *Washington*, 294 F. Supp. 912, 916 (D. D.C. 1968) (concurring opinion).[22]

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[21] There are many reasons, including conscientious objection (see e.g. *Torcaso* v. *Watkins*, 367 U.S. 488; *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624), why one might balk at taking such oaths. See also, e.g., *Aptheker* v. *Secretary of State*, 378 U.S. 500, 511-12; *Baggett* v. *Bullitt*, 377 U.S. 360, 367-70; *Keyishian* v. *Board of Regents*, 385 U.S. 589, 600-01. As the facts in *Adams* v. *O'Connell* demonstrate, App., *infra*, p. 15a, an employee might even object to taking the oath because he had already properly executed it. See *O'Connell* Memorandum (Oct. 16, 1969), App., *infra*, pp. 20a-21a.

[22] This due process defect is part and parcel of the vagueness doctrine. Mr. Justice Brennan's concurring opinion in *United States* v. *Robel*, 389 U.S. 258, 269, provides one of the most recent full dress analysis of the vagueness doctrine, when isolated from the overbreadth doctrine. His analysis matches the Court's positions in *Interstate Circuit* v. *City of Dallas*, 390 U.S. 676, 684-85 and *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147. It demonstrates that when an allegation of vagueness is made in a complaint, it is taken to include lack of procedural safeguards. As Justice Brennan suggested, a vague statute has one or a combination of three deficiencies. "First . . . [a] failure to provide adequate standards . . . [which] reflects Congress' failure to have made a 'legislative judgment' . . . ." 389 U.S. at 275. "Second . . . [A failure to] take steps to assure, 'respect for constitutional

Such indications as we have in this Court's decisions are to the effect that due process requires some type of hearing before a non-signer may be disqualified solely because he will not sign a required oath. Cf. *Speiser* v. *Randall*, 357 U.S. 513; *Lamont* v. *Postmaster General*, 381 U.S. 301. Recent decisions of the Court point the way to a guarantee for the prospective employee who risks the stigma of a non-signer. *Slochower* v. *Board of Higher Education*, 350 U.S. 551, is particularly apposite. There the Court refused to permit New York to draw an automatic inference of disloyalty from an employee's invocation of the Fifth Amendment privilege against self-incrimination. *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, and *Konigsberg* v. *State Bar of California*, 353 U.S. 252, extended a comparable protection to applicants for admission to the bar who were suspected of disloyalty because of their refusal to disclose certain past associations.[23]

On the basis of these precedents, a three-judge federal district court found Idaho's loyalty oath unconstitutional because it afforded no procedure by which the non-signer might explain his actions and vindicate his loyalty. *Heckler* v. *Shepard*, 243 F. Supp. 841, 845 (D. Idaho 1965).

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liberties' by preventing the existence of 'a wide gulf between the responsibility for the use of . . . power and the actual exercise of that power.' Procedural protections to avoid that gulf have been recognized as essential when fundamental freedoms are regulated." *Id.* at 277-78. "Third. The indefiniteness of the delegation . . . also results in inadequate notice to affected persons." *Id.* at 281.

[23] In recent cases concerning control of obscenity, the Court has also stressed the importance of hearings when First Amendment rights may be jeopardized by government action. See *Freedman* v. *Maryland*, 380 U.S. 51; *A Quantity of Books* v. *Kansas*, 378 U.S. 205; *Bantam Books* v. *Sullivan*, 372 U.S. 58; *Marcus* v. *Search Warrant*, 367 U.S. 717.

The provisions in the instant case are constitutionally vulnerable on just this ground. As developed also in *Slochower,* to draw an inference of disloyalty and disqualification from an unexplained refusal to sign—and without even affording an opportunity to explain—deprives the applicant of due process of law in the most basic sense. Thus, the instant loyalty oath scheme is procedurally as well as substantively deficient. See also, *Speiser* v. *Randall,* 357 U.S. 513; *Haskett* v. *Washington,* 294 F. Supp. 912, 918 (D. D.C. 1968) (concurring opinion).

POINT III

The Court below erred in ruling that some portions of the Florida statute and oath were severable from the unconstitutional portions.

When reviewing the constitutionality of state statutory provisions, as a matter of course the federal courts resolve questions of severability. See *Dorchy* v. *Kansas,* 264 U.S. 286, 291; *Williams* v. *Standard Oil of Louisiana,* 278 U.S. 235. It is also settled that the federal courts are obligated to apply the severability rules of the state. See, e.g., *Morey* v. *Doud,* 354 U.S. 457, 470 n. 16; *Reitz* v. *Mealey,* 314 U.S. 33, 38-39; *In re Wisconsin Builders Supply Co.,* 239 F.2d 649, 656-657 (7th Cir. 1956), *cert. denied,* 353 U.S. 985.

The Florida rules on severability have been articulated by the Florida Supreme Court:

> "The rule is well established that the unconstitutionality of a portion of a statute will not necessarily condemn the entire act. When a part of a statute is

declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken." *Cramp* v. *Board of Public Instruction of Orange County*, 137 So.2d 828, 830 (Fla. 1962); see also *Small* v. *Sun Oil Co.*, 222 So.2d 196, 199 (Fla. 1969).

The Court below did not apply the Florida rules of severability in this case. From its citation of this Court's decision in *United States* v. *Jackson*, 390 U.S. 570, 585, it seems to have applied its own inaccurate understanding of the federal rule, which it suggested required a statute to "be construed as severable where it is possible to interpret its provisions as distinct and to assume that legislature would have enacted the provisions separately." (Jt. App. p. 147) (305 F. Supp. at 430)

Accurately enough, on the other hand, the Court below observed that "this very statute has been said to be severable." *id.* In fact, after this Court's 1961 decision in *Cramp*, the case was remanded to the Supreme Court of Florida. The Florida Court ruled that this Court had declared only one phrase in the oath and statute unconstitutional: "... that I have not [lent] and will not lend my aid, support, advice, counsel or influence to the Communist

Party . . ." Applying Florida rules of severability, it then held that the void provision was severable from the statute and oath, and all else remained in force. 137 So.2d 828 (Fla. 1962).

However, since it is now clear that not just one but between three or four or five of the five operative provisions of the oath and the statute are unconstitutional, the severability issue must be considered anew. Obviously if, as appellant has contended, all of the operative provisions are unconstitutional, the entire statute (§§876.05-876.10 Fla. Stats. Ann.) should be voided. The five sections of the statute are concerned solely with the loyalty oaths and their enforcement; they have no other reason to exist. Compare *Whitehill* v. *Elkins*, 287 F. Supp. 61 (D. Md. 1968) (on remand from the Supreme Court). But even if one or two of the operative clauses were considered to be constitutional if enacted alone, the entire statute and oath still should be declared unconstitutional. So little would remain of the scheme enacted by the legislature that: "We have no way of knowing whether the Legislature would have enacted . . . [it] without the provision[s] which we conclude to be invalid. We are unable to decide that these provisions are separable." *Pedlosky* v. *Massachusetts Institute of Technology*, 352 Mass. 127, 224 N.E.2d 414, 416 (1967). Accord, *Richardson* v. *Cole*, 300 F. Supp. 1321 (D. Mass. 1969), *vacated and remanded*, 397 U.S. 238; *Whitehill* v. *Elkins*, 287 F. Supp. 61 (D. Md. 1968).

Even under Florida law it is well settled that, when the valid and invalid portions of a statute are inextricably intertwined, connected and interdependent in subject mat-

ter and purpose, the presumption that the legislature would have passed one portion without the others is precluded. Indeed, the conclusion is compelled that the legislature would not have done so. See 2 Sutherland, *Statutory Construction*, Sections 2418, 2407, 2404 (3rd Ed., 1943), especially if the statute embodies criminal or penal provisions, *id.* Section 2418.[24] . .

The Florida statute, §§876.05-876.10 is such an interwoven and comprehensive whole. The entire statute and the entire oath are void, therefore, even if portions might have been valid had they been enacted separately. The Florida Supreme Court has, in effect, so ruled. On remand in *Cramp*, the Florida Supreme Court declared:

> "The obvious legislative purpose in enacting the subject statute was to prevent the election or employment of public officials and employees who are knowingly disloyal to the government of the United States or to the State of Florida and who subscribe to the doctrine of accomplishing a change in government by the employment of force and violence. In this regard we have examined the legislative recitals included in the enactment of Chapter 25046, Laws of Florida, 1949, which was the original act that prescribed the loyalty oath in question. There can be no doubt that the legislative intent was primarily directed to the accomplishment of the objective which we have epitomized." 137 So.2d at 830. See also *Connell* v. *Higginbotham*, 305 F. Supp. at 450.

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[24] On severability generally see Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76 (1937).

The Florida Supreme Court, to be sure, also declared that:

> "There can likewise be little doubt that regardless of the invalid language the Florida Legislature would have enacted into law the remainder of the statute. The elimination of the subject language would leave intact a valid, coherent, workable statute. The invalid language did not so permeate or saturate the remainder of the act as to make it impossible to enforce the remaining valid portions after the elimination of those which are invalid. We, therefore, hold that when the portion of the statute declared unconstitutional by the Supreme Court is eliminated, the balance of the act should and does remain in full force and effect." 137 So.2d at 830-31.

But the State of Florida cannot have it that way any longer. It is hoist on its own petard! The gloss placed on the statute by the state's Supreme Court is controlling, as to the statute's meaning and scope. According to that gloss the statute is a unitary, interwoven whole. It must stand or fall as a unitary, interwoven whole—at least after a majority of its provisions have been declared unconstitutional. If it is not so interwoven, then the remaining provisions lack meaning or independent standing and must fall anyway.

Even if the entire statute is not void for lack of severability, it is still unconstitutional *in toto*. The purpose of the statute, each clause, each provision, is now clear. It was designed "to prevent the election or employment of public officials and employees who are knowingly disloyal to the government of the United States or to the State of Florida

and who subscribe to the doctrine of accomplishing a change in government by the employment of force and violence." 137 So.2d at 830. As this brief demonstrates, such a purpose clearly violates the First Amendment and the Fourteenth Amendment's due process clause.

Hence the judicial gloss on the statute has poisoned the whole and each of its parts. It must now be struck down in its entirety.

CONCLUSION

Since 1961 this Court, and the nation's other courts, have consistently voided loyalty oaths and statutes such as the ones at issue in this case. This case, the direct descendant of the *Cramp* case, provides the Court with an opportunity to settle finally the constitutional controversy over test oaths, and to evaluate an affirmative oath in a negative context. For the reasons set forth in this brief, the Court should declare Florida's remaining loyalty oaths and statutes unconstitutional; and further should declare all such test oaths to be interdicted.

Respectfully submitted,

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Attorneys for Appellant[25]

August 1970

[25] We are indebted to Nicholas Waranoff, a student in his final semester at the New York University School of Law, for his assistance in preparing this brief.

United States Constitutional Provisions Involved

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes

876.05 *State employees; oath.*—

(1) All persons who now or hereafter are employed by or who now or hereafter are on the payroll of the state, or any of its departments and agencies, subdivisions, counties, cities, school boards and districts of the free public school system of the state or counties, or institutions of higher learning and all candidates for public office, are hereby required to take an oath before any person duly authorized to take acknowledgments of instruments for public record in the state in the following form:

I, ..., a citizen of the State of Florida and of the United States of America, and being employed by or an officer of ..... and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence.

(2) Said oath shall be filed with the records of the governing official or employing governmental agency prior to

the approval of any voucher for the payment of salary, expenses, or other compensation.

History.—Comp. §1, ch. 25046, 1949.

Note.—See 7 L.Ed. 2d 285 and 137 So. 2d 828 as to constitutionality of section.
cf.—§90.01, Oaths, requirements.

876.06 *Discharged for refusal to execute.*—If any person required by §§876.05-876.10 to take the oath herein provided for fails to execute the same, the governing authority under which such person is employed shall cause said person to be immediately discharged, and his name removed from the payroll, and such person shall not be permitted to receive any payment as an employee or as an officer where he or she was serving.

History.—Comp. §2, ch. 25046, 1949.

876.07 *Persons giving aid, advice, etc., to communist party.*—Any person having taken the oath provided for in §876.05 and who thereafter should become a member of the communist party or who lends aid, support, advice, counsel or influence to the communist party or who expresses any belief in or advocates the overthrow of the government of the United States or of the state by violence or force or thereafter becomes a member of an organization or party which believes in or teaches directly or indirectly the overthrow of the government of the United States or of the state by force or violence, shall immediately be discharged from his employment by the employing authority and his name shall be removed from the payroll, and thereafter such person shall not be permitted to receive any payment as an employee or an officer where he or she then was serving. Any person seeking to qualify for public office who fails or refuses to file the oath required by this act shall be held to have failed to qualify as a candidate for

public office, and the name of such person shall not be printed on the ballot as a qualified candidate.

History.—Comp. §3, ch. 25046, 1949.

876.08 *Penalty for not discharging.*—Any governing authority or person, under whom any employee is serving or by whom employed who shall knowingly or carelessly permit any such employee to continue in employment after failing to comply with the provisions of §§876.05-876.10, shall be guilty of a misdemeanor and shall be punished by a fine not exceeding five hundred dollars or by imprisonment not exceeding six months or by both fine and imprisonment.

History.—Comp. §4, ch. 25046, 1949.

876.09 *Scope of law.*—

(1) The provisions of §§876.05-876.10 shall apply to all employees and elected officers of the state, including the Governor and constitutional officers and all employees and elected officers of all cities, towns, counties and political subdivisions, including the educational system.

(2) This act shall take precedence over all laws relating to merit, and of civil service law.

History.—Comp. §§5, 7, ch. 25046, 1949.

876.10 *False oath; penalty.*—If any person required by the provisions of §§876.05-876.10 to execute the oath herein required executes such oath, and it is subsequently proven that at the time of the execution of said oath said individual was guilty of making a false statement in said oath, he shall be guilty of perjury, and shall be prosecuted and unished for the crime of perjury in the event of conviction. punished for the crime of perjury in the event of conviction.

History.—Comp. §6, ch. 25046, 1949.

Loyalty Oaths

LOYALTY OATH

As required by Chapter 25046 (No. 50) Acts of 1949

I, ... a citizen of the State of Florida and of the United States of America, and being employed by or an officer of ..... and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Community Party; that I do not believe in the overthrow of the government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the government of the United States or of Florida by force or violence.

.....

STATE OF FLORIDA,
COUNTY OF .....

Personally appeared before me ..... who states ..... has read the foregoing oath and is familiar with what it says and that ..... signed it freely and voluntarily, and in my presence.

SWORN TO before me this .....
day of ..... A.D. 19.....

.....

LOYALTY OATH

As required by Chapter 25046 (No. 50) Acts of 1949

"I, ... a citizen of the State of Florida and of the United States of America, and being employed by or an officer of ..... and a recipient of public funds as such employee or officer do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence."

.....

STATE OF FLORIDA,
COUNTY OF ....., *ss.*:

Personally appeared before me ..... who states ..... has read the foregoing oath and is familiar with what it says and that ..... signed it freely and voluntarily, and in my presence.

SWORN TO and subscribed to and before me this ..... day of ....., A.D. 196 .....

.....
Notary Public

MY COMMISSION EXPIRES:

.....

(NOTARY SEAL)

Memorandum Opinion

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF FLORIDA

ORLANDO DIVISION

No. 69-240-Orl-Civ

DR. PAUL L. ADAMS, JOHN HARDIN BEST, ROBERT L. CURRAN, RICHARD P. AHYNES, MARGARET ANNE HUGHES, ROBERT W. KEISER, LEROY L. LAMBORN, JAMES D. MILLIKAN, NORMA P. MUNN, O. RUTH MCQUOWN and ROBERT R. SHERMAN, individually, and on behalf of all other persons similarly situated,

Plaintiffs,

—v.—

THE BOARD OF REGENTS OF THE STATE OF FLORIDA, a Florida corporation, D. BURKE KIBLER, DR. LOUIS C. MURRAY, JOHN C. BEHRINGER, PAT DODSON, CHESTER FERGUSON, HENRY D. KRAMER, CLARENCE L. MENSER, JULIUS F. PARKER and MRS. E. C. (CAROLYN) PEARCE, members of the Board of Regents, STEPHEN C. O'CONNELL, President of the University of Florida,

Defendants.

MEMORANDUM

(1970)

Before:

SIMPSON, *Circuit Judge,*
YOUNG and SCOTT, *District Judges.*

PER CURIAM.

The plaintiffs in this case are and were faculty and staff members of the University of Florida and other state institutions under control of the defendant Board of Regents.

On October 16, 1969, while *Connell* v. *Higginbotham,* 38 LW 2266, —— F. Supp. ——, No. 69-34-Orlando-Civil, Middle District of Florida 1969, was being considered by the Court, President Stephen C. O'Connell of the University of Florida issued a memorandum to all faculty and staff of the University informing them that they would be required to execute the loyalty oath prescribed by Section 876.05 of the Florida Statutes. Plaintiffs, in their complaint, stated that on information and belief similar directives would be forthcoming from other administrators operating under the control of the Board of Regents.

Plaintiffs have (a) never executed a loyalty oath or (b) executed a loyalty oath which was not acknowledged or (c) executed a loyalty oath under protest.

Plaintiffs then brought this action alleging the requirement to execute the oath violated their constitutional rights and requesting a temporary restraining order preventing defendants from dismissing them before an adjudication on the merits. The motion for the temporary restraining order, to prevent their dismissal by defendants, was heard by a single judge of this Court (Judge Young) on the

date, October 30, 1969, that the opinion and judgment in *Connell, supra,* was announced. After announcing the decision in *Connell,* Judge Young denied the motion for a temporary restraining order. He pointed out that under the ruling announced by *Connell,* defendants could lawfully require the plaintiffs to take a portion of the oath as a condition of employment with the state. See *Connell, supra.* He further pointed out that should plaintiffs decline to execute the constitutional portion of the oath, and should they be dismissed by defendants, any injury to them could be compensated by damages if they were successful on the merits before the three-judge panel or on appeal.

On November 14, 1969, plaintiffs' motion for emergency consideration of an appeal was denied by a panel of the Court of Appeals for the Fifth Circuit for want of jurisdiction.

Subsequently, plaintiffs Anne C. Bardsley, LeRoy L. Lamborn and Evan Suits refused to execute the oath as modified by *Connell* and were discharged by defendants.

The parties having stipulated that this cause shall be determined solely upon the pleadings herein, together with a stipulation of facts, and having adopted the briefs filed in the case of *Connell* v. *Higginbotham, et al., supra,* after due consideration by this three-judge district court, we hereby hold the following:

1. This Court has jurisdiction pursuant to 28 U.S.C. §§1331, 1343, 2201, 2202, 2281 and 2284, as well as the First, Fifth and Fourteenth Amendments to the Constitution of the United States.

2. Plaintiffs have standing to bring this action.

3. Leave to prosecute this suit as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure is granted.

4. Defendants may condition employment and the payment of salary on the execution of the following portion of the loyalty oath prescribed by Section 876.05 of the Florida Statutes:

> "I, ..., a citizen of the State of Florida and of the United States of America and being employed by or an officer of ..... and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence".

All other portions of the loyalty oath prescribed by Section 876.05 of the Florida Statutes, as well as the corresponding provisions of Section 876.07 of the Florida Statutes, are unconstitutional and defendants may not condition employment or the payment of salary on the execution of those provisions. *See Connell* v. *Higginbotham, supra.*

5. Judge Simpson adheres to the views expressed in *Connell, supra,* 38 LW 2266, —— F. Supp. ——. For the reasons there indicated, he would further strike from the loyalty oath prescribed by Section 876.05 of the Florida Statutes, as unconstitutional, the following language:

> ". . . that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence".

Judge Young adheres to the views expressed in his special concurrence in *Connell, supra,* 38 LW 2266, —— F. Supp. ——.

6. Since we hold that defendants may condition employment and payment of salary on the taking of the loyalty oath described in (4) above, we further hold that the *dismissal* of plaintiffs LeRoy L. Lamborn, Anne C. Bardsley and Evan Suits for refusal to execute this approved oath was lawful.

7. We affirm the denial of the motion for temporary restraining order, by Judge Young of this panel, refusing to enjoin the dismissal of plaintiffs for refusal to execute the approved portion of the loyalty oath.

/s/ BRYAN SIMPSON
United States Circuit Judge

/s/ GEORGE C. YOUNG
United States District Judge

/s/ CHARLES R. SCOTT
United States District Judge

Judgment

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF FLORIDA

ORLANDO DIVISION

No. 69-240-Orl-Civ

DR. PAUL L. ADAMS, JOHN HARDIN BEST, ROBERT L. CURRAN, RICHARD P. AHYNES, MARGARET ANNE HUGHES, ROBERT W. KEISER, LEROY L. LAMBORN, JAMES D. MILLIKAN, NORMA P. MUNN, O. RUTH MCQUOWN and ROBERT R. SHERMAN, individually, and on behalf of all other persons similarly situated,

Plaintiffs,

v.

THE BOARD OF REGENTS OF THE STATE OF FLORIDA, a Florida corporation, D. BURKE KIBLER, DR. LOUIS C. MURRAY, JOHN C. BEHRINGER, PAT DODSON, CHESTER FERGUSON, HENRY D. KRAMER, CLARENCE L. MENSER, JULIUS F. PARKER and MRS. E. C. (CAROLYN) PEARCE, members of the Board of Regents, STEPHEN C. O'CONNELL, President of the University of Florida,

Defendants.

It is

ORDERED AND ADJUDGED:

1. Final judgment shall be and is hereby entered in favor of plaintiffs Dr. Paul Adams, et al. and on behalf of

all persons similarly situated, and against defendants The Board of Regents of the State of Florida, et al. in accordance with the per curiam opinion of the Court.

2. Defendants, their agents, officers or employees, are permanently enjoined from conditioning employment on the taking of an oath which prescribes "that I am not a member of the Communist Party" or "that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party" or "that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the United States by force or violence", which provisions are now contained in Section 876.05 of the Florida Statutes. Defendants, their agents, officers and employees, are likewise permanently enjoined from enforcing Section 876.07 of the Florida Statutes in such a manner as to require the execution of the above disapproved phrases as a condition to remaining in defendants' employ or as a condition to receiving payment from defendants for services rendered.

3. The Court retains jurisdiction of this suit for the purpose of insuring compliance with this injunction.

4. Costs shall be hereafter taxed in favor of plaintiffs and against defendants.

DONE AND ORDERED this 27th day of January, 1970.

/s/ BRYAN SIMPSON
United States Circuit Judge

/s/ GEORGE C. YOUNG
United States District Judge

/s/ CHARLES R. SCOTT
United States District Judge

Temporary Restraining Order

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

ORLANDO DIVISION

No. 69-240-Orl-Civ.

DR. PAUL ADAMS, *et al.*,

Plaintiffs,

—vs.—

THE BOARD OF REGENTS OF THE STATE OF FLORIDA, *et al.*,

Defendants.

On October 24, 1969, plaintiffs in the above styled cause filed their complaint against defendants seeking a hearing and determination of the federal constitutional issues allegedly involved in §876.05 of the Florida Statutes. Plaintiffs are nine members of the faculty and two staff members presently employed by the University of Florida, and defendants are the Board of Regents of the State of Florida, a body corporate, the members of the Board of Regents, and Stephen C. O'Connell, President of the University of Florida.

Plaintiffs filed a motion for temporary restraining order to restrain defendants from requiring plaintiffs to sign the Florida loyalty oath as provided by §876.05 of the Florida Statutes, and as amended by the decision of the Supreme Court of the State of Florida in *Cramp* v. *Board of Public*

Instruction, 137 So. 2d 528 (1962). Attached to the complaint were copies of a memorandum from President Stephen C. O'Connell to all Deans, Directors, and Department Chairmen requiring that a constitutional oath be signed by each faculty and staff member prior to November 15, 1969, together with a copy of the form of oath which was to be executed by all personnel of the University of Florida.

The motion was heard upon notice to all parties on October 30, 1969, counsel for plaintiffs, the Board of Regents, and President Stephen C. O'Connell all being present before the Court. Counsel stipulated that plaintiffs were all faculty and staff members presently employed by the University of Florida, as alleged in the complaint; that President Stephen C. O'Connell had sent out the memorandum attached to the complaint, and that the loyalty oath in the form attached to the complaint was required to be executed or re-executed by all personnel at the University of Florida. The parties, through their respective counsel, further stipulated that plaintiffs had refused to execute the oath in the form presented to them by the authorities of the University of Florida.

Immediately prior to the hearing on the motion for temporary restraining order, a decision and final judgment was filed in the case of *Connell* v. *Higginbotham,* No. 69-34-Orlando-Civil, United States District Court, Middle District of Florida, Orlando Division, in which a three judge court held that only the following language of §876.05 of the Florida Statutes is constitutional, and the state may condition employment on the execution of an oath containing language, to-wit:

> "I, ..., a citizen of the State of Florida and of the United States of America and being

employed by or an officer of ..... and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the constitution of the United States and of the State of Florida; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence".

The aforesaid *Connell* case held the following clauses contained in the oath submitted to the plaintiffs to be unconstitutional: "that I am not a member of the Communist party" and "that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence."

The decision by the three judge court in *Connell* is binding on this single judge and controls the decision that must be made on the application for a temporary restraining order. In *Connell* the undersigned judge noted his reluctance to concurring with the holding of unconstitutionality of the two above quoted clauses but that controlling decisions compelled such a determination. Again, as in *Connell*, this Court must abide by the law as it understands it to be; trial courts have no authority to make the law—only authority to apply it.

The plaintiffs have neither shown irreparable damage to them in the event the entire oath were eventually held to be unconstitutional nor shown a likelihood that the portions of the oath approved in the Connell case may eventually be held unconstitutional by the Supreme Court of the United States. As the undersigned judge noted from the bench at the conclusion of the hearing on the application for a temporary restraining order, there is more involved

in this and similar cases than just the rights of the plaintiffs alone. In speaking of constitutional rights, the rights of all citizens are equally involved. The constitution is not only an instrument guarantying rights to individuals, but it is a blueprint for Government; it is the basic document upon which our Government is based. So, in considering the rights of individuals, they cannot be viewed in an isolated vacuum, but must be considered in light of mutual rights. While the Government may not inflict punishment or a penalty for the failure of a person to avow support of the Constitution or of the Government, I think that it is a legitimate end of the Government to ascertain whether or not an employee who is going to work for the Government believes in the principles of the Government for which it works—the basic principles that are so important to this nation: the right of free speech; the right to worship as one pleases; the right of a free press; the right to a jury trial and have counsel among others are the precepts upon which our Government is based.

It seems to me that it is a legitimate end for the employer-Government in hiring employees to know if the employees believe in the overthrow of the Government by violent means. In fact, I think that the Government would be derelict if it didn't know that, and if it didn't know it, it might be that it would not be long before the Constitution which is the shield under which this action is brought, might cease to exist.

So, a temporary restraining order granting the relief prayed for, predicated upon the plaintiffs refusing to sign any oath should not be granted. However, in view of the decision in *Connell,* the plaintiffs are entitled to have an oath submitted to them which complies with that decision; it is, therefore,

ORDERED that the temporary restraining order prayed for by the plaintiffs be and is hereby denied except that the oath submitted to the plaintiffs or any members of the class they represent shall not contain the language disapproved as unconstitutional in *Connell* v. *Higginbotham, supra.* Therefore, it is further,

ORDERED that the defendants, their agents, officers or employees are temporarily restrained from conditioning employment on the taking of an oath which prescribes "that I am not a member of the Communist Party" or "that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the United States by force or violence", which provisions are now contained in Section 876.05 of the Florida Statutes. The defendants, their agents, officers and employees are likewise temporarily restrained from enforcing Section 876.07 of the Florida Statutes in such a manner as to require the execution of the above disapproved phrases as a condition to remaining in the defendants' employ or as a condition to receiving payment from the defendants for services rendered. This order shall remain in force until final hearing and determination thereon by the full court.

DONE and ORDERED in Chambers at Orlando, Florida, this 7th day of November, 1969.

GEORGE C. YOUNG
United States District Judge

Copies mailed to:

Jerome J. Bornstein, Esquire
125 South Court Avenue
Orlando, Florida

Rivers Buford, Jr., Esquire
1124 Alachua Street
Tallahassee, Florida

Thomas S. Biggs, Jr., Esquire
623 Barnett Bank Building
Jacksonville, Florida

Administrative Memorandum

UNIVERSITY OF FLORIDA

Gainesville

Office of the President October 16, 1969

MEMORANDUM

To: Deans, Directors and Department Chairmen

Re: Loyalty Oath

Section 876.05, Florida Statutes, 1969, requires that a loyalty oath shall be filed by all persons employed by the State, and that such an oath must be filed prior to the approval of any voucher for the payment of salary, expenses, or other compensation. At its meeting on February 3, 1969, the Board of Regents amended the oath required of employees of the University System to concur in the wording prescribed by the Supreme Court of Florida.

A review of the personnel files reveals that many of the loyalty oath forms contain wording which has been determined to be unconstitutional. Others have not been properly notarized.

To insure that each personnel file contains a loyalty oath that is properly worded and notarized as required by the Florida Statutes it is necessary that each member of the faculty and staff complete a current oath.

Enclosed are forms for each faculty and staff member paid from the budgetary accounts you administer, together with a check list for each account. Please ask each person listed

to complete a new loyalty oath and have his signature notarized. The completed cards should be returned, together with the check lists, to the Personnel Division, Room 217, Hub, by November 15, 1969.

Notaries in the various colleges, divisions and departments should be used whenever possible. The Personnel Division employs three notaries whose services are available upon request. Should you desire their assistance, please make arrangements by calling Luther Bunn, 2-1209.

Stephen C. O'Connell
President

October 17, 1969

MEMORANDUM

To: All Staff

FROM: Stephen J. Pritz
Assistant in Administration

SUBJECT: Completion of Current Loyalty Oath

Section 876.05, Florida Statutes, 1969, requires that a Loyalty Oath be filed by all persons employed by the State and that the Oath must be filed prior to the approval of any voucher for the payment of salary, expenses, or other compensation.

It appears that many of the Loyalty Oath forms now on file in Personnel records contain wording which has been determined to be unconstitutional. Some forms have not been properly notarized. To insure consistency, the Personnel Division has asked us to have each staff member listed on our current budget complete a new Loyalty Oath with the signature properly notarized. Mr. Sagonias, our Chief Pharmacist, is a Notary Public; and arrangements can be made to fulfill the requirements of proper notarization.

It is imperative that the forms be completed at your earliest possible convenience. Please be advised that the Florida Board of Regents Operating Manual states that any employee refusing to comply with the provisions of this section of the Florida Statutes shall be dismissed. If you have questions regarding any part of this, please come to my office; and we will try to find a satisfactory answer to your problem.

SJP:ddr

UNIVERSITY OF FLORIDA

Gainesville

Office of the President — November 7, 1969

Will those faculty members who did not sign the original oath, please see edie 164C

MEMORANDUM

To: Deans, Directors and Department Chairmen

Re: Loyalty Oath

On October 16 you received a memorandum from my office concerning the State of Florida loyalty oath. On October 30 the Circuit Court in Orlando ruled certain portions of this oath to be unconstitutional and enjoined the Board of Regents and the University of Florida from requiring a signature to the oath distributed with that memorandum.

Attached hereto you will find a memorandum from the Office of the Board of Regents setting out the revised oath and outlining the procedure to be followed. You will note that it will not be necessary to require an employee to execute this revised form of oath if an oath was executed in conformity with the memorandum of October 16 prior to October 30, 1969. You will also note that anyone who wishes to execute a new oath and withdraw the previously executed oath should be permitted to do so.

Enclosed are new forms with the revised oath printed thereon. To insure proper certification of the payroll for November, please deliver a properly executed and nota-

rized loyalty oath for each employee, together with the check lists to the Personnel Division by November 20, 1969. This is necessary to insure that all employees are paid on schedule.

You are again cautioned that, in order to be valid, this oath must be signed in the presence of a notary. You will find attached a list of notaries and their locations.

I realize that a short length of time is provided for obtaining properly executed oaths. I therefore ask that all persons give their full cooperation in achieving this end.

STEPHEN C. O'CONNELL
Stephen C. O'Connell
President

Stipulation

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF FLORIDA

ORLANDO DIVISION

Civil Action No. 69-240

DR. PAUL ADAMS, *et al.*,

Plaintiffs,

—VS—

THE BOARD OF REGENTS OF THE STATE OF FLORIDA, *et al.*,

Defendants.

IT IS HEREBY stipulated and agreed by and between counsel for the respective parties as follows:

1. That ANNE C. BARDSLEY and EVAN SUITS come within the class affected by the outcome of this litigation, and shall be joined as parties Plaintiff in this cause.

2. That LEROY L. LAMBORN, ANNE C. BARDSLEY and EVAN SUITS have refused to sign the loyalty oath prescribed by Section 876.05 of the Florida Statutes, as modified by the decision of this Court in *Connell* vs. *Board of Public Instruction*, a copy of the oath furnished to these Plaintiffs being annexed hereto and incorporated herein by reference as Exhibit "1".

3. That as a direct result of the refusal of these Plaintiffs to execute under oath the loyalty oath attached hereto to Exhibit "1", LAMBORN, BARDSLEY and SUITS were discharged from their employment by the University of Florida on November 26, 1969.

4. That LEROY L. LAMBORN had been employed by the University of Florida as Assistant Professor of Law for the Academic year 1969-1970 at a salary of $12,000.00, a copy of his appointment of employment being attached hereto and incorporated herein by reference as Exhibit "2".

5. That EVAN SUITS had been employed by the University of Florida as Interim Instructor in the Department of Psychology at a monthly salary of $375.00 for the academic year, 1969-1970.

6. That ANNE C. BARDSLEY had been employed by the University of Florida as a Clerk II in the Library system, at a monthly salary of $314.00 for the period of July 1, 1969 to June 30, 1970.

7. That the academic year, 1969-1970, at the University of Florida commenced September 16, 1969, and concludes June 15, 1970.

DATED this 17th day of December, 1969.

/s/ RIVERS BUFORD, JR.
Rivers Buford, Jr.
General Counsel
State Board of Education
The Capitol, Suite 105
Tallahassee, Florida 32304
Attorney for the Board of Regents and Each of the Regents Individually

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